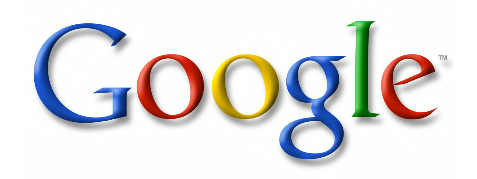
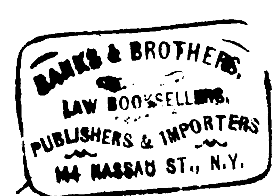

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DECISIONS

DE LA

COUR D'APPEL.

QUEEN'S BENCH REPORTS,

QUEBEC.

RECUEILLIES ET PUBLIÉES PAR

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DECISIONS

DE LA

COUR D'APPEL.

QUEEN'S BENCH REPORTS.

MONTREAL, 20TH SEPTEMBER 1881.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, J. J.

JOHN FAIR,

Plaintiff in the Court below.
APPELLANT,

&

ARCHIBALD CASSILS,

Defendant in the Court below.
RESPONDENT.

HELD:—Reversing the Judgment of the Superior Court, that a party who has no personal interest in the action or proceeding, although individually named in the record, may be examined as a witness on behalf of the parties whom he represents.—

John Fair, the Plaintiff, brought this action in his capacity of assignee to the Insolvent estate of Alexander Seath.

At *enquête* he was produced as a witness for the demand. The Defendants objected to his examination, on the ground, that, being the Plantiff in the cause, he could not be examined on his own behalf. The Court below maintained the objection.

The present motion is for leave to appeal from this Judgment, and it is urged by the Plaintiff, that as he only acts in a representative capacity, as the assignee of the estate of Alexander Seath, he is not the real Plaintiff in the cause, and that having no interest in the procedings, he is a competent witness.

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Dorion, Chief Justice.—The question we are about to decide is, can a party acting *en autre droit*, who has no interest in a proceeding, but who is individually named in the record, be a competent witness on behalf of those whom he represents?

By the French law the parties to a suit, or having an interest therein, and their relatives and connections by marriage within certain degrees were and are still incompetent to give their testimony in such suit.

These disqualifications applied, as well to the parties individually named in the record, although they might have no personal interest in the proceedings, as to those whom they represented and on whose behalf the action was brought or defended;—but as regards the relatives and connections of the parties, the disqualifications only applied to those of the parties really interested in the proceeding, whether they were individually named in the record or not. (Pothier, Oblig., Nos. 825, 826 et 827.)

These rules were in force here until 1860, when the act 23 Vict., ch. 57, was passed and removed the disqualifications resulting from interest and those applying to the relatives of the parties and to persons connected to them by marriage, with the exception of the husband and wife. This act also provided, that: "Any party may be summoned and examined as a witness by any other party in the same "cause, &c.—but no such evidence shall be turned to the "advantage of the party giving it."

These provisions were transferred to the consolidated statutes, ch. 82, and were subsequently embodied in articles 1231 and 1232 of the Civil Code and 251 and 252 of the Code of Civil procedure.

These articles are as follows:—

Art. 1231—" All persons are legally competent to give "testimony, except:—

"1o. Persons deficient in understanding, whether from "immaturity of age, insanity or other cause;

"2o. Those insensible to the religious obligation of an oath;

"3o. Those civilly dead;

"4o. Those declared infamous by-law;

"5o. Husband and wife, for or against each other;

Art. 1232. "Testimony given by a party in a suit cannot " avail in his favor."

" A witness is not rendered incompetent by reason of rela- " tionship or of being interested in the suit; but his credibi- " lity may be affected thereby."

Art. 251 C. of C. P. " Any party may be subpoenaed, exa- " mined, cross-examined, and treated as any other witness; " but his evidence cannot avail himself, &c......"

Art. 252. " Relationship or connection by marriage, except " that between consorts, and interest, are not objections to " the competency of a witness, but only to his credibility."

Art. 1231 lays down the broad rule, that all persons are competent to give testimony unless they come within the five exceptions therein mentioned, which exceptions do not include the parties to a suit.

Articles 1232 of the Civil Code and 251 of the Code of Civil procedure expressly authorise the examination of parties, when their testimony cannot avail to themselves—or " can- " not turn to the advantage of the party giving it," to use the expressions of the 23 Vict., ch. 57, and of the Consolidated Statutes, ch. 82.

In what case can evidence turn to the advantage or avail to a party? The answer seems plain that it is when such evidence can affect beneficially the interest of the party in whose favor it is given, and if a party has no interest in the suit which he is carrying on, his evidence cannot turn to his advantage or be of any avail to him.

But it is said that the meaning of art. 1232 of the Civil Code and 251 of the Code of Civil Procedure is that which was formally, expressly in the 49th sect. of the 23 Vict., ch. 57; that a party in a cause may be examined as a witness by any other party, but not on his own behalf, and that according to art. 14 of the Code of Civil Procedure, " No person can be " a party to a suit, either as claimant or defendant, in any " form whatever, unless he has the free exercise of his rights, " saving where special provisions apply; " and that, therefore, the only parties recognised by the Code are the persons named, as such, in the record.

However plausible this reasoning may appear, it is not unanswerable. The meaning of art. 14 is, that persons cannot appear and urge their claims before a Court of Justice, unless

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they have the free exercise of their rights, or are represented in the manner prescribed by law. It is in that restricted sense that the commissioners have,rather improperly,used the expressions referred to, that, " No person can be a party to a " suit &c......" instead of no person can in his own name bring a suit or can be a party to a record, for all the authors agree that tutors, curators and administrators are not properly speaking the parties in a cause, but that it is the minors, the persons interdicted, or the persons, or bodies represented by their administrators who are, through them, the real parties. *Pothier*, *Procédure Civile*, *Ed. Bugnet*, *No.* 201, says: " L'ordonnance, tit. 10, art. 1, porte: " Permettons aux par" ties de se faire interroger." Il n'y a donc régulièrement " que les parties au procès que l'on peut faire interroger.

" Néanmoins lorsqu'un tuteur est partie en sa qualité de " tuteur, quoique ce ne soit pas lui qui soit partie, on peut le " faire interroger sur faits et articles, etc." See also the authorities cited by Mr. Justice Casault, in the case of *Thompson* and *Pelletier*, 7 Quebec Law. Rep., p. 59.

The word " party " therefore designates as well the persons in whose name the proceedings are carried on, as those on whose behalf and for whose benefit they are adopted.

It is in this last sense that the word party is used in section 51 of the 23 Vict., ch. 57, to remove the incompetency attaching to the relatives and to the connections of the parties by marriage, for the relatives of a tutor, of an executor, or of an administrator were never disqualified to give evidence in the proceedings in which they figured in those qualities, and it would have been absurd to declare that those persons who were not disqualified should hereafter be competent witnesses. It was the relatives and connections by marriage of those whom they represented, that were incompetent to give evidence in their favor, and it is to remove such incompetency that the statute was enacted.

It is, also, in that sense that the word party is used in section 49 allowing parties to be examined as a witness by any other party in the same cause.

If the word party was here used to designate the party individually named in the record, although not interested in the suit or proceeding, and not to the party really interested, heresullt would be that a minor, an heir or a legatee

might be examined as witnesses in a cause waged in their own behalf and of which they are to derive the whole benefit, while the tutor or executor in whose name the suit is carried could not be a witness, although they had no interest in its result. It cannot be supposed that the intention of the legislature was to sanction such consequences.

Again, the changes made in the rules of evidence by the 23 Vict, ch. 57, were evidently suggested by the legislation which had recently taken place in the Imperial Parliament, both as regards England and Scotland.

In 1840, the disqualifications of witnesses resulting from their relationship to the parties to a suit, were removed, as regards Scotland, by the 3 and 4 Vict., ch. 59—and in 1852, by the 15 and 16 Vict., ch. 27, those on the ground of interest or of a conviction for an infamous crime were done away with.

By this last statute, it was further enacted that ;

§ 2.—" It shall be competent to adduce and to examine as a " witness as aforesaid in any action or proceeding, any party to " such action or proceeding, *even although individually named* " *in the record or proceeding, unless it be shown to the satisfac*- " *tion of the Court, or of the person having authority to take* " *evidence as aforesaid, that such party has a substantial inter*- " *est in such action or proceeding, and is not merely nominally* " *a party thereto.*"

In England the incompetency of witnesses on the ground of a pevious conviction for a criminal offense or of interest were removed by Lord Denman's act (6 and 7 Vict., ch. 85, 1843) which contained the following provision :

" No person offered as a witness shall hereafter be excluded " by reason of incapacity from crime, or interest, from giving " evidence either in person or by deposition &c...... Provided " that this shall not render competent any party to any suit, " action, or proceeding individually named in the record &c... " Or any person in whose immediate and individual behalf " any action may be brought or defended either wholly or in " part, &c......"

In 1853 those restrictions were done away both in England and Scotland and the parties, whether individually named in the record or not, were permitted to give evidence in their own behalf.

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The distinction is clearly made in all these statutes between the parties individually named in the record, but who had no interest in the suit or proceeding, and those in whose behalf the action was brought or defended. Lord Denman's act excluded both these parties, that is the nominal as well as the real party, from giving evidence, while the 15 and 16 Vict., ch. 27. having reference to Scotland only excluded the party having a substantial interest in the suit. If the intention had been to exclude here both the nominal and the interested party from giving evidence, the legislature would, no doubt, have used adequate expressions to that effect, such as are to be found in Lord Denman's act. Instead of that, the Canadian Statute does not in express terms exclude any of the parties, except by saying that the testimony given by a party cannot *turn to his advantage*, or as the Code has it, that any party to a suit may be examined, *but his evidence cannot avail himself.* We have already shown that this could only apply to a party having an interest in the suit. The 23 Vict., ch. 57, has, therefore, introduced here, using different expressions, the rule which prevailed in Scotland under the intermediate legislation which was in force there from 1852 to 1853.

There is not as yet in this Province, any fixed jurisprudence on this question. In the cases of *Cruise* and *Darmody* which had been instituted by testamentary executors, objection was taken to the examination of the universal legatee in whose interest the actions were brought, but the Court below held, that not being a party to the record the universal legatee was a competent witness.

In *Jacquays* vs. *Hagar* and *Fitts & al*, one of the Intervening parties was allowed to give his testimony, although objected to on the ground that he was one of the testamentary executors and one of the legatees of the estate represented by the intervening parties.

In this last case, the witness was a party named in the record in his capacity of executor and he was interested in the result of the suit as a legatee.

These cases were decided, in appeal, in 1875, on other grounds and this Court expressed no opinion on the admissibility of the evidence so given.

In the recent case of *Thompson & Pelletier*, already mentioned, Mr. Justice Casault, in a most elaborate judgment,

held that a tutor who was not personally interested in a suit, was a competent witness on behalf of his ward.

I am informed that Mr. Justice Rainville gave a similar judgment in the case of *Campbell* & *Chabot*, and Mr. Justice Jetté, in *Laramée* & *Evans*.

We beleive these three last judgments have rightly interpreted the articles of the Code bearing on this subject, and we are therefore of opinion that an appeal ought to be granted from the judgment which has denied to the Plaintiff the right of giving his evidence in this cause.

The Defendants have raised the question, that the Plaintiff had an interest in the cause as he is entitled to receive a commission on the amount of property which he may recover. We think that this eventuality does not constitute such a substantial interest as ought to prevent his being examined in the cause.

The Assignee is in the position of a clerk or of *a mandataire* whose salary would be paid by a commission. He has no more interest than a sheriff would have on an opposition *afin de distraire* to prevent the sale of real estate seized.

Mr. Justice Monk while concurring in the judgment that the appeal should be granted said, " I am not quite satisfied " that the Plaintiff is a competent witness and I will there- " fore reserve to express my opinion."

Motion for leave to appeal granted.

Laflamme & Laflamme, for Plaintiff.

L. N. Benjamin, for Defendant.

MONTREAL, 30TH JUNE 1881.

Coram DORION, C. J., MONK, RAMSAY, CROSS & BABY, J. J.

No. 1389-142.

JAMES CAFFREY,

Defendant in the Court below,

APPELLANT;

AND

WM. F. LIGHTHALL,

Plaintiff in the Court below,

RESPONDENT.

HELD :—1st. That it is not sufficient, in an affidavit for a *capias ad respondendum*, to state, that the Defendant is about to leave the heretofore Province of Canada with intent to defraud his creditors, but that the affidavit must also state the reasons why the Deponent entertains such belief.

2o. That a party temporarily in the Province of Canada, on business, cannot be arrested on an affidavit that he is about to leave to return to his domicile.

3rd. That the allegations, that the Defendant is endeavoring to escape from his obligations, towards a party who is not the Plaintiff, and, that the Defendant is endeavoring to deny his indebtedness to the Plaintiff, and thus to escape the payment of the sum of money, due to the Plaintiff, are not sufficient to sustain a *capias ad respondendum*.

The Appellant was arrested, at the instance of the Respondent, on a writ of *capias ad Respondendum*, issued out of the Superior Court, at Montreal, for an alleged indebtedness amounting to the sum of $5,025.

The affidavit on which the *capias* issued was as follows :—
" William F. Lighthall, of the City and District of Montreal, " Notary Public, the Plaintiff herein, being duly sworn, doth " depose and say :

" I am the Plaintiff herein.

" That James Caffrey, of Truro, in the County of Colchester, " in the Province of Nova Scotia, miner, the Defendant here- " in, is well and truly, at the City of Montreal, personally " indebted to me, in a sum exceeding forty dollars, to wit in " the sum of five thousand and twenty-five dollars currency " of Canada, being as and for the price and value of services " rendered by me to the said James Caffrey, at the City of " Montreal, on and previous to, and within four months im- " mediately preceding, the twenty first day of September last " past, in connection with the sale and transfer of certain " mines situate in the Province of Nova Scotia, the property " of the said James Caffrey, to John A. Cameron, of Fairfield, " in the County of Glengarry, and Province of Ontario,

" Esquire, which said sale of said mines, was made on the " fifth day of September last past, and subsequently further " defined and arranged between the said Cameron and the " said Caffrey, on the twenty first day of September last past. James Caffrey & W. F. Lighthall

" That on the fifth day of September last past, at the City " of Montreal, the said Defendant did acknowledge himself " in writing to be indebted to Deponent in the sum of five " thousand dollars.

" That Deponent has reason to believe, and verily and in " his conscience does believe, that the said James Caffrey, to " wit, the Defendant, is immediately about to leave the here- " tofore Province of Canada, with intent to defraud his cre- " ditors in general, and the Plaintiff in particular.

" That such departure will deprive the Deponent of his " recourse againt the said Defendant; and further that the " said James Caffrey is only temporarily in the City of Mon- " treal, and has no domicile within the heretofore Province " of Canada, but resides in the Province of Nova Scotia, for " which Province the Defendant is immediately about to " leave.

" And the said Deponent further saith, that the said James " Caffrey has acted in bad faith and is endeavoring to escape " from his obligation towards the said John A. Cameron, and " to avoid a certain agreement entered into, at the City of " Montreal, between the said John A. Cameron and Defen- " dant, said James Caffrey, on the fifth and twenty first days " of September last past, and is further endeavoring to deny " his indebtedness to Deponent, and to escape the payment " of the said sum of money.

" That without the benefit of a writ of *capias ad responden-* " *dum* to seize the body of the said Defendant James Caffrey, " the Deponent will lose his recourse and sustain damage.

" And Deponent hath signed.

" Sworn to and acknowledged " before us, at the City of " Montreal, this fifteenth day " of October, eighteen hun- " dred and seventy-eight. } (Signed) Wm. F. Lighthall."

" (Signed) Hubert, Honey & Gendron,

" P. S. C."

The Appellant presented a petition to set aside the *capias*:

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on the ground of insufficiency in the allegations of Plaintiff, and also because the allegations were untrue. The parties were heard, by consent, on the law issue raised by the petition as to the sufficiency of the affidavit, and the Court below maintained that the allegations were sufficient in law.

The appeal is from this judgment.

Dorion, C. J.—From the perusal of the affidavit, it appears that beyond the causes of indebtedness therein stated, the Respondent alleges but the following facts:

That the Defendant is immediately about to leave the heretofore Province of Canada with intent to defraud his creditors; that he is only temporarily in the City of Montreal, and has no domicile within the heretofore Province of Canada, but resides in the Province of Nova Scotia, for which province he is immediately about to leave; and finally, that the Defendant has acted in bad faith and is endeavoring to escape from his obligation towards one John A. Cameron and to avoid a certain agreement entered into between said Cameron and Defendant, on the fifth and twenty first days of September last past, and is further endeavoring to deny his indebtedness to Respondent and to escape the payment of the sum of money which he owes him.

It has been repeatedly decided, that it is not sufficient, in an affidavit for a *capias ad respondendum*, to state that the Deponent is informed and believes that the Defendant is about to leave the Province of Canada with intent to defraud his creditors, but that the affidavit must also state the source of information of the Deponent or the reasons of his belief that the Defendant is about to depart with intent to defraud. It has also been decided, and more particularly in the case of *Hurtubise & al* and *Bourret & al*, (23 L. C. J., 130), that a party, temporarily in the Province of Canada on business, could not be arrested on the affidavit that he was about to leave to return to his domicile.

This disposes of the two first allegations contained in the affidavit, as to the Defendant being about to leave the Province with interest to defraud his creditors.

The third allegation is that the Defendant has acted in bad faith and is endeavoring to escape from his obligation, not towards the Plaintiff, but towards one John A. Cameron.

This might or might not be a good ground for an arrest at the instance of Cameron, although the charge is put in such general terms that it could hardly justify the issueing of a writ of *capias*, even at the instance of Cameron, and they certainly do not justify the Plaintiff in sueing out a *capias* on such flimsey grounds.

The only remaining allegation is that the Defendant is further endeavoring to deny his indebtedness and to escape the payment of the sum of money due to Plaintiff.

If that allegation were a good cause for the issueing of a writ of *capias*, every Defendant who denied the claim of a Plaintiff would be subject to be arrested, for not only would he be endeavoring to deny the indebtedness of the Plaintiff, but he would actually deny it, and the allegation that Defendant is endeavoring to escape the payment of the sum claimed by Plaintiff does not even state, that he attempts to do so by unlawful means.

The allegations are therefore totally insufficient to sustain the *capias* issued against Defendant, and the judgment of the Court below must be reversed and the *capias* quashed, with cost, against Respondent.

Judgment reversed.

Edward Carter, *Q. C.*, for Appellant.

D. MacMaster, for Respondent.

MONTRÉAL, 22 NOVEMBRE 1881.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 382.

GERMAN MOTT COSSITT & AL,

Demandeurs en Cour de première instance,

APPELANTS;

ET

CLAUDE LEMIEUX,

Défendeur en Cour de première instance,

INTIMÉ.

JUGÉ :—Qu'il n'y a pas lieu à la contrainte par corps contre un débiteur qui, après avoir été arrêté sur *capias ad respondendum*, a fourni un cautionnement spécial au désir de l'art. 824 du Cod. Proc. civ. qu'il ne laissera pas la ci-devant province du Canada, s'il ne fournit pas un bilan et ne fait pas une cession de biens sous trente jours de la date du jugement qui a déclaré le *capias* valable. La première partie de l'art. 766 du C. de proc. civ. ne s'applique pas à ce débiteur, et la Requête du créancier pour contrainte par corps doit dans ce cas être renvoyée.

Les Appelants, qui, en octobre 1880, ont obtenu un jugement contre l'Intimé pour la somme de $2,134.45, ont, le 22 décembre suivant, fait émaner un bref de *capias ad respondendum*, sur affidavit qu'il recelait ses biens dans le but de les frauder.

L'Intimé a été arrêté le 23 décembre 1880, et le 27 du même mois, il a été libéré en fournissant le cautionnement requis par l'art. 824 du C. de Pr. Civ., qu'il ne laisserait pas la ci-devant province du Canada.

Le même jour, 27 décembre 1880, l'Intimé a demandé par requête à ce que le *capias* fut annulé. Cette requête a été renvoyée le 27 avril 1881, et le 10 mai 1881, la Cour Supérieure a maintenu le *capias* et déclaré valable l'arrestation de l'Intimé.

Le 17 juin 1881, les Appelants, qui n'avaient reçu qu'une faible partie de leur créance, ont, par une requête à la Cour Supérieure, demandé l'émission d'un bref de contrainte par corps contre l'Intimé, parce qu'il n'avait pas déposé son bilan, ni fait une cession de ses biens, dans les trente jours de la date du jugement qui avait maintenu le *capias* et l'arrestation de l'Intimé.

Les Appelants ont invoqué, à l'appui de leur requête, l'article 2274 du Code Civil et les dispositions du chap. 87 des Statuts Refondus du Bas-Canada, sect. 12 reproduites, du moins en partie, dans le Code de Procédure Civile.

L'Intimé à répondu a cette requête, qu'ayant fourni un cautionnement spécial qu'il ne laisserait pas la province, il n'était pas tenu de déposer un bilan ni de faire une cession de ses biens et ses prétentions ont été maintenues par la Cour de première instance, qui a renvoyé la requête des Appelants par jugement du 27 juin 1881. C'est ce jugement, que les Appelants demandent à faire infirmer par leur appel.

Dorion, Juge en Chef.—Pour bien faire comprendre la question qui nous est soumise et les difficultés qu'elle présente, il faut remonter à l'origine du *capias* et rappeler les dispositions législatives qui l'ont introduit et les changements qu'elles ont subies depuis.

En vertu de l'ordonnance de 1774, (15 Geo. 3, ch. 2, sect. 4 et 38,) un créancier, dont la créance excédait dix livres sterling, pouvait obtenir *un capias ad respondum* et faire arrêter son débiteur quelqu'il fût, commerçant ou autre, sur un affidavit qu'il était sur le point de laisser la Province. Ce débiteur pouvait être libéré en donnant un cautionnement qu'il se rendrait dans un certain délai, après que le jugement serait rendu, et il était alors sujet à être emprisonné sur un *capias ad satisfaciendum* jusqu'à ce que la dette fût payée. Cette procédure était empruntée au droit anglais et le cautionnement s'appelait cautionnement spécial ou cautionnement à l'action. Dans les affaires commerciales, entre marchands et commerçants, ou lorsque la dette était due à un marchand sur vente de marchandises, le créancier pouvait, après avoir discuté les biens de son débiteur, le faire arrêter sur *capias ad satisfaciendum* et le faire emprisonner jusqu'à ce qu'il eût payé sa dette, en lui payant pas moins de trois chelins et demi par semaine, ou même cinq chelins, si la Cour l'ordonnait.

En 1825, le Parlement changea la condition du cautionnement spécial, en décrétant, par l'acte 5, Geo. 4, ch. 2, sect. 1, qu'à l'avenir tout débiteur arrêté sur *capias ad respondendum* pourrait être libéré en donnant, soit avant, soit après le jugement, un cautionnement qu'il ne laisserait pas la Province.

Par l'acte 6, Guil. 4, ch. 4, sect. 1, 2 et 3, (1835, il a été pourvu à ce qu'un débiteur emprisonné sur *capias ad satisfaciendum* pourrait, en tout temps, être libéré en fournissant un

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état sous serment de ses biens, meubles et immeubles, accompagné d'une déclaration qu'il consentait à en faire cession à ses créanciers, et en donnant un cautionnement qu'il ne laisserait pas les limites du district de son domicile. Cette disposition, quoiqu'applicable par ses termes à tout débiteur emprisonné sur un *capias ad satisfaciendum*, avait pour but de venir au secours des marchands et commerçants emprisonnés en vertu de la 38e sect. de l'Ordonnance de 1774, qui ne pouvaient avant cela sortir de prison qu'en payant leur dette. Les autres débiteurs arrêtés en vertu de la 4e sect. de l'Ordonnance, n'avaient pas besoin de cet acte, puisqu'ils pouvaient se faire libérer en vertu de l'acte 5 Geo. 4, ch. 2, en donnant un cautionnement qu'ils ne laisseraient pas la Province et sans fournir d'état de leurs biens. L'obligation de fournir un bilan ou état de leurs biens ne s'appliquait donc qu'à ceux qui, étant arrêtés sur un *capias ad satisfaciendum*, ne pouvaient donner un cautionnement spécial en vertu de l'acte 5 Geo. 4, ch. 2.

Ces dispositions sont demeurées en vigueur jusqu'à 1849, lorsque l'acte 12 Vict., ch. 42, intitulé " *Acte pour abolir l'emprisonnement pour dettes et punir les débiteurs frauduleux dans le Bas-Canada et pour d'autres objets* " les a remplacées par des dispositions nouvelles.

Cet acte a aboli le *capias ad satisfaciendum* et a permis d'arrêter, sur *capias ad respondendum*, tout débiteur d'une somme de £10 et au-dessus, non seulement lorsqu'il était sur le point de laisser la Province, mais encore lorsqu'il cachait ou était sur le point de cacher ses biens; mais dans les deux cas, il fallait que le débiteur eût l'intentention de frauder ses créanciers. Le débiteur ainsi arrêté pouvait être libéré en donnant un cautionnement au shérif de comparaître, tel que prescrit par la loi, ou en donnant un cautionnement, qu'il se remettrait sous la garde du shérif, sous un mois après signification d'un ordre à cet effet émané de la Cour ou d'un juge, (sect. 1 et 3.) Ce cautionnement devait être donné avant le jugement final.

Par la section 4, il est pourvu à ce que, lorsqu'un défendeur qui aura fourni le cautionnement requis par la section précedente aura été condamné à payer une somme de vingt louis ou au-dessus, il sera tenu, sous trente jours à compter du jugement, de produire au bureau du Protonotaire, un état

sous serment indiquant les biens, meubles et immeubles qu'il possède avec déclaration qu'il consent à les abandonner à ses créanciers. Cet état doit de plus indiquer les noms de ses créanciers et le montant de leurs créances.

Cette section pourvoit de plus à ce que, dans le cas où le défendeur ne produirait pas cet état dans le délai d'un mois, ou que si l'ayant produit, cet état est contesté dans les deux ans après sa production et que le défendeur refuse de comparaître ou de répondre aux questions qui lui seront posées touchant cet état, ou encore s'il est prouvé que le Défendeur a volontairement omis d'y insérer des biens d'une valeur d'au-moins vingt livres courant, ou que depuis la poursuite, ou pendant les trente jours qui l'ont précédée, le Défendeur a caché quelque partie de ses biens, ou donné un état faux de ses créanciers, ou de leurs réclamations, pour frauder ses créanciers, il pourra être condamné à un emprisonnement n'excédant pas une année.

La section 5 permet à tout défendeur emprisonné pour dette de produire en tout temps un état semblable. Cet état peut être contesté dans les quatre mois après sa production pour les mêmes raisons que celles mentionnées dans la 4e section et s'il n'y a pas de contestation ou si elle est rejetée, le débiteur, à l'expiration des quatre mois, sera libéré, si, au contraire, la contestation est maintenue, il pourra être condamné à un emprisonnement n'excédant pas une année.

Par la section 8, il est pourvu à ce qu'un créancier qui a obtenu un jugement au montant de £20 ou plus, pour dette commerciale entre marchands, ou pour une dette due à un marchand pour vente de marchandises, peut, en signifiant une copie du jugement et un avis par écrit, requérir le Défendeur de produire au bureau du Protonotaire, sous trente jours de la signification, un état de ses biens, etc., et si le Défendeur ne se conforme pas à cet avis, etc., il peut être emprisonné par ordre de la Cour ou d'un juge, pour une période n'excédant pas une année.

Cet acte s'applique à toutes les personnes emprisonnées pour dettes ou qui le seront par la suite. (sect. 10.) Mais par la section 12, il est déclaré que, nonobstant cet acte, toute personne arrêtée sur un *capias ad respondendum* pourra fournir le cautionnement spécial ou cautionnement à l'action, tel qu'autorisé par les lois du Bas-Canada, mais que ce cautionnement

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ne serait pas reçu, s'il n'était donné le ou avant le jour du rapport du bref, ou dans les huit jours après.

Les sections 13 et 14 règlent la forme du cautionnement au shérif et la cession que le shérif pouvait en faire au Demandeur.

Ainsi, d'après cet acte, le débiteur arrêté sur *capias ad respondendum* pouvait donner un cautionnement au shérif qu'il comparaitrait au retour de l'action ou dans les huit jours après le retour, ou il pouvait, en tout temps avant le jugement, donner un cautionnement qu'il se rendrait au shérif lorsque requis par un ordre de la Cour ou d'un juge, ou il pouvait, jusqu'à huit jours après le retour de l'action, donner un cautionnement qu'il ne laisserait pas la Province. Ainsi jugé dans la cause de *Vannever C Sewell*, (14 L. C. Rep., 239.) S'il donnait le cautionnement de se remettre entre les mains du shérif lorsque requis, il pouvait être emprisonné, si dans les trente jours après signification de l'ordre de la Cour ou d'un juge à cet effet, il ne fournissait pas un état sous serment de ses biens, etc. Mais s'il fournissait, dans les huit jours après le retour du bref de *capias*, le cautionnement qu'il ne laisserait pas la Province, dans ce cas, ni lui ni ses cautions ne pouvaient être inquiétés, à moins qu'il ne laissât la Province.

Toutes les dispositions de l'acte de 1849 ont été reproduites dans le chap. 87 des Statuts Refondus du Bas Canada, mais en changeant l'ordre de certaines dispositions, on les a rendues moins claires. Ainsi l'on a divisé la section 12 de l'acte de 1849, qui permet au Défendeur de donner un cautionnement spécial, et l'on en a placé une partie dans la section 3 du ch. 87 des statuts refondus, et une partie dans la section 21e, et comme dans la 10e section des statuts refondus, l'on dit que tout Défendeur qui a été condamné à payer une somme de $80 et qui a été arrêté et a fourni le cautionnement tel que plus haut pourvu, devra sous un délai de trente jours fournir un état de ses biens, l'on est d'abord porté à croire que cette section doit s'appliquer aussi bien au cautionnement spécial, qu'au cautionnement que le Défendeur se rendra au Shérif s'il en est requis;—mais il est évident d'après l'ensemble de l'acte, que ce n'est pas là l'interprètation qu'il faut donner à la clause 10 des statuts refondus. Cette interprétation serait contraire aux dispositions de l'acte de 1849 et l'on ne peut pas supposer, que les commissaires qui on consolidé les

statuts aient fait des changements qu'ils n'avaient pas le droit de faire. D'ailleurs la section 10 des statuts refondus veut que si le Défendeur refuse de fournir un état etc., la Cour peut ordonner qu'il sera emprisonné pour une période n'excédant pas une année, et que s'il ne se rend pas, tel qu'ordonné par la Cour, les personnes, qui se sont portées cautions qu'il se rendrait, seront de suite tenues au paiement de la dette, intérêts et frais. Ceci ne peut s'appliquer aux cautions spéciales qui n'ont pas promis de payer la dette si le Défendeur ne se rendait pas sans l'ordre de la Cour, mais de la payer seulement dans le cas où le Défendeur laisserait la province.

En transférant les dispositions du ch. 87 des statuts refondus dans le Code, l'on en a fait deux sections distinctes, l'une qui raite de la cession de biens et l'autre du capias. L'on a conservé les deux formes de cautionnement, le cautionnement spécial que le Défendeur ne laisserait pas la province et le cautionnement qu'il se rendrait au Shérif sur l'ordre de la Cour, art. 824 et 825 C. P. C., et quoique les articles 766, 776 et 777 ne soient pas rédigés avec toute la précision désirable, il est certain que la première partie de l'art. 766 ne s'applique qu'au Défendeur qui a fourni des cautions qu'il se rendrait au Shérif sur l'ordre de la Cour, et non à celui qui a fourni un cautionnement spécial qu'il ne laisserait pas la province. Quant à la seconde partie de l'article 766, elle s'applique à ceux qui ont été condamnés à payer une dette commerciale de $80 et au-dessus, qu'ils aient donné caution ou non, mais l'Appelant ne procède pas ici en vertu de cette disposition qui exige des formalités spéciales.

Nous croyons donc que l'Intimé n'était pas tenu de fournir un bilan—ou état de ses biens—et que le jugement qui a renvoyé la requête de l'Appelant est bien fondé.

Cette question a déjà été jugée dans le même sens par le juge en chef de la Cour Supérieure dans une cause de *Poulet & Launière*. (6 Rap. Jud. de Québec, 314.)

En supposant que l'Intimé serait tombé sous le coup de la 1e partie de l'art. 766 du Code de Procédure et qu'il aurait été tenu de fournir un bilan sous un délai de trente jours de la date du jugement, l'Appelant aurait encore une difficulté sérieuse à surmonter. C'est que l'art. 766, ni aucun autre

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article du code, ne dit que faute de produire son bilan, le Défendeur sera emprisonné pour une période quelconque

L'acte de 1849 et les statuts refondus, ch. 87, permettaient, dans ce cas, à la Cour d'ordonner l'emprisonnement pour une période n'excédant pas une année. L'art. 776 dit bien que, si le Demandeur prouve que le Défendeur, en fournissant son bilan, a commis quelques-unes des offenses mentionnées dans l'art. 773, ou s'il refuse de comparaître ou de répondre aux questions qui lui seront faites concernant son bilan, il pourra être condamné à un emprisonnement n'excédant pas une année ; mais le cas où il refuse de fournir son bilan n'est pas prévu.

C'est là une lacune causée sans doute par inadvertance, mais comme les dispositions relatives à la contrainte par corps ne s'étendent pas d'un cas à un autre, il est pour le moins douteux, que, lors même que le Défendeur aurait été tenu de fournir un bilan, il aurait pu être condamné à un emprisonnement pour ne pas l'avoir fait, à moins que ce ne fût pour mépris de Cour en vertu de l'article 2273 du Code Civil.

Tessier, Juge.—La question qui se présente regarde l'interprétation de l'article 766 du Code de Procédure et de l'article 2274 du Code Civil.

Les Appelants ont fait prononcer bon et valable un *capias ad respondendum* contre l'Intimé Lemieux sur le motif de recel frauduleux dans les circonstances suivantes :

Le 19 octobre 1880 les Appelants obtinrent jugement contre Lemieux, pour $2134. Le 22 décembre suivant les Appelants obtinrent un bref de *capias ad respondendum* contre l'Intimé Lemieux, sur un affidavit alléguant recel frauduleux. Le 23 il fut logé en prison. Le 27 décembre 1880, il obtint sa libération, en donnant un cautionnement qu'il ne laisserait pas l'ex-province du Canada avant d'avoir payé la dette. Après contestation du *capias* par Lemieux, ce *capias* fut déclaré bon et valide, le 10 mai 1881. Le 17 juin 1881, plus de trente jours après ce dernier jugement, l'intimé n'ayant pas fait cession de biens et déposé bilan au désir de l'article 766 du Code de Procédure, les Appelants Cossitt ont demandé la contrainte par corps, sans autre notification préalable contre le défen-

deur Claude Lemieux. Le 27 juin 1881 la Cour Supérieure a renvoyé cette demande, sur le motif que Lemieux, en vertu de son cautionnement subsistant, n'était pas sujet à la contrainte par corps pour ne pas avoir fait cession et déposé bilan.

Avant d'interpréter les sections particulières de nos codes sur lesquels les Appelants fondent leur demande, il est bon de se rappeler que la tendance de notre législation depuis longtemps a été d'adoucir la rigueur de la loi dans le cas d'emprisonnement en matière civile, et dans ce but on a aboli le *capias ad satisfaciendum.* La voie du *capias ad respondendum* nous est restée, mais cette voie n'est pas et n'a jamais été un mode d'exécution, c'est seulement une voie d'assignation avec la condition que le défendeur demeurera dans la jurisdiction, soit en prison, soit sous cautionnement de ne pas laisser la jurisdiction, que l'on a étendue par nos statuts aux limites de la ci-devant Province du Canada. Or, l'Intimé Lemieux a donné le cautionnement pourvu par l'article 824 du Code de Procédure, connu en Angleterre sous le nom de "*special bail to the action*," qu'il ne laissera pas la province, à moins de payer la dette réclamée. C'est là l'obligation intervenue entre les parties, elle résulte de la loi et couvre toutes les exigences du bref de *capias ad respondendum*, s'il n'y a pas eu infraction à ce cautionnement, le débiteur n'est tenu rien à faire de plus.

Le statut 12 Victoria, chapitre 42, qui a pourvu à la cession de biens, d'où l'article 766 de notre Code de Procédure est tiré, en fait une réserve spéciale en statuant: " que rien dans " cet acte n'empêchera le débiteur de donner le cautionne- " ment spécial à l'action " c'est-à-dire, de ne pas laisser la province.

Les Appelants raisonnent comme si l'intimé Lemieux eût donné cautionnement de faire une cession de ses biens sous trente jours de la signification du jugement ou ordre de se remettre sous la main de la justice, dans le cas de l'article 825, C. P. C., mais il n'a donné aucun tel cautionnement ; ou s'il pouvait être puni par la contrainte par corps, parce que le *capias ad respondendum* a été obtenu et maintenu à cause de recel frauduleux.

Voyons maintenant s'il y a un texte de nos lois qui prononce, dans les circonstances actuelles, la contrainte par corps

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contre le defendeur qui a donné le cautionnement spécial de ne pas laisser la province, sans avoir payé la dette. La cession de biens est un mode introduit en faveur du débiteur, pour aider à la libération de ceux à qui il serait impossible de fournir des cautions, ou qui voudraient libérer les cautions. C'est par analogie quelque chose qui ressemble à la "*cessio bonorum*" qui avait lieu à la dernière période plus adoucie de la procédure Romaine. Le premier article 763 du Code de Procédure prononce ce remède comme facultatif aux débiteurs, mais dans les articles suivants il est exigé que, si le débiteur use de ce moyen, il est tenu de faire une cession et un bilan complets et de bonne foi; s'il ne l'est pas, le débiteur pourra être emprisonné sous forme de punition pour un temps n'excédant pas douze mois dans les cas spécifiés aux articles 773 et 776. En effet l'article 766 du C. P. C. ne prononce pas la peine d'emprisonnement au cas de la non production du bilan, du moins sans être préalablement requis de le produire. Le 1er paragraphe de cet article 766 concorde avec l'article 825, mais non pas avec l'article 824, sous l'empire duquel le cautionnement en cette cause a été donné. En référant aux articles 773 et 776, aux cas dans lesquels le débiteur peut être condamné à la contrainte par corps, on ne trouve pas parmi les offenses qui y sont indiquées, celle du refus ou de la négligence d'avoir produit cette cession de biens. L'article 2274 du Code Civil n'indique pas les cas d'emprisonnement, mais réfère au chapitre 87 des Statuts Refondus du Bas-Canada et au Code de Procédure Civile. La peine d'emprisonnement portée dans ce statut existe-t-elle encore, quoique non reproduite dans le Code? Cela serait douteux pour le cas du cautionnement de l'article 825; mais il ne peut y avoir de doute pour le cas du cautionnement spécial de l'article 824, qui ne constitue le débiteur en faute que s'il laisse la province, dont les limites sont substituées pour le débiteur aux limites de la prison ordinaire. Lorsqu'il s'agit de prononcer la contrainte par corps, il faut un texte positif; s'il y a doute, il doit être interprété en faveur de la liberté du sujet.

On peut se demander, à quoi sert le second paragraphe du même article 766, qui exige daus un jugement au delà de $80 pour une dette d'une nature commerciale, une réquisition du créancier au débiteur de faire cession. Si le débiteur arrêté ou sous caution est tenu de faire cette cession dans tous les

cas, par le seul laps du délai de trente jours, à quoi sert ce second paragraphe ? Mais si l'on adopte l'interprétation que, par le premier paragraphe, le débiteur peut, s'il le veut, et dans l'intérêt de sa libération finale, produire cette cession, le second paragraphe vient à avoir son application en rendant compulsoire dans le cas particulier de ce paragraphe la production de la cession et du bilan, et au refus de le produire et de se conformer au jugement du juge ou du tribunal, il s'exposerait à commettre un acte de désobéissance et de mépris des ordonnances de la Cour, qui le rend sujet à la contrainte par corps. En effet les mots en tête de la section 18, du chapitre 87, des Statuts Refondus du Bas-Canada, portent: " L'état pourra être exigé en certains cas." C'est le cas seulement du 2nd paragraphe de l'article 766 C. P. C., lorsque le débiteur en est spécialement requis. C'est la seule peine substituée à la place du *capias ad satisfaciendum*, dans ce cas particulier, avec réquisition préalable.

Les raisons données par l'Honorable Juge en Chef Meredith, de la Cour Supérieure *in re Poulet* & *Launière*, 6 vol. Décisions des Tribunaux de Québec, me paraissent conclusives. C'est la même question que celle qui se présente ici. Par analogie on trouve les mêmes principes adoptés dans une cause de *Sewell* & *Vannever*, 14 Rapports du Bas-Canada, p. 251.

Ces considérations me portent à croire que le jugement qui nous est soumis dans cette instance est conforme à la véritable interprétation de nos lois.

Le bref de *capias ad respondendum* a son utilité, celui de retenir constamment le débiteur dans la jurisdiction (*ad respondendum*) pour répondre à toutes les poursuites du créancier, qui peut en ce cas saisir le produit de l'industrie, du travail du débiteur, tous les biens qui pourront lui advenir jusqu'à ce qu'il ait payé la dette.

Cette Cour est donc d'opinion de confirmer le jugement de la Cour Inférieure avec dépens.

Ramsay, J., Dissenting.—The Appellants sued the Respondent for $2,134.44. While the case was pending, they also took out a *capias* for fraudulent disposal of his estate, under which Respondent was arrested. He gave bail under article

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824, C. C. P. That is to say, he gave bail that he would not leave the province, and that in case he did so his sureties should pay the debt. He then, according to the wording of the Code, obtained his "*discharge.*" In due time judgment was rendered against the Respondent, and Appellants waited in the vain hope that within 30 days, he would make an abandonment of his property under article 766. Finding that the Respondent did not intend to do anything of the sort, the Appellants moved to commit him.

Respondent answered: "I have given bail and been discharged, and I have fulfilled the conditions of my bond. You have no further recourse against me."

This answer was considered sufficient by the Court below, and Appellants' petition was rejected.

Appellants very properly remark, that if the fraudulent debtor can escape from making the statement under oath, and the declaration of abandonment of all his property, for the benefit of his creditors, by giving bail under article 824, C. C. P.; then there is practically an end to all coercion of fraudulent debtors. All they will have to do is to secrete their effects and give bail they will not leave the province, and by holding to the promise of not abandoning a country which deals with them so charitably, their secreted property, themselves and their sureties will be left untroubled.

The only difficulty that seems to me can arise to prevent the Court disposing of these pretensions comes from the unfortunate mode we have adopted in dealing with legislation. The Act of the 12th Vict. (c. 42) was passed to abolish imprisonment for debt and for the punishment of fraudulent debtors. I do not think that the object of this Act was only to soften the rigour of the laws affecting the relation between debtor and creditor. It was intended to soften their rigour as against honest debtors, and to intensify their rigour as against fraudulent debtors. The former were not thereafter to be liable to any imprisonment in satisfaction of their debt, but the latter were to be held in gaol or under bail until the Court was satisfied that they had delivered up all their property. I think sections 3, 4 and 5 of the Act makes sufficient provision for putting this system in force. Section 3 provides for bail before judgment, by which the debtor obtains his release "from such arrest and confinement," not "his dis-

charge." Section 4 provides for what the debtor, who has given bail before judgment, must do after judgment to avoid going to gaol, and section 5 provides what the person absolutely incarcerated may do either before or after judgment to obtain "his discharge."

After this Act had been in force for 12 years, it was thought necessary to appoint a commission for the consolidation of the statutes. The statute we have just been considering had to be re-shaped, or re-made, and to be incorporated with other statutes. The dispositions of the 12 Vict. appear in chap. 87, C. S. L. C., which is styled an Act respecting arrest, *and imprisonment for debt*, and the relief of insolvent debtors. The only disposition of the 12 Vict., respecting imprisonment for debt, was to abolish it, and by the consolidation it was to remain abolished.

To make such a change of name in a consolidation which was only to perpetuate its abolition, was, to say the least of it, infelicitous. It is, however, only just to say that the consolidation has fairly enough represented the law as it stood, and that in this respect it is open to no greater reproach than having confused the order of the text, and so given those who are desirous of following up the legislation to its source an infinity of trouble.

But it has omitted to do what would really have been useful.

In the 12 Vict. there is a section 12 which had no longer any meaning after the abolition of imprisonment for debt. That sort of arrest *ad respondendum*, simply because the debtor was leaving the jurisdiction, could no longer arise. It formed part of the machinery for enabling the creditor to get at the body of his debtor, by the writ *ad satisfaciendum*. Nothing more was required than to keep him in the province or to give security for the payment of the debt. Instead of leaving out this section of the 12 Vict., which is in very general terms, and very innocuous, the commissioners having restored the terms of the 5 Geo. IV, dragged it into prominence as sec. 3.

The 12 Vict., sec. 12, preserved any right to put in special bail to the action which then existed by any laws in force, in other words it was a very maladroit saving clause. Whereas, the consolidated acts permit any one arrested under any

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writ of *capias ad resp.* to put in bail, the condition of which is that cognizers are not liable unless the Defendant leaves the province without paying the debt and for which action is brought, this amplification was not only inconvenient but it paved the way for further blundering.

We have next to turn to the C.C.P., where we are to look for models of legal diction, free from redundancy, precise and technical. By article 824 C.C.P., we are told that "The Defendant may obtain his *discharge* upon giving security that he will not leave the province of Canada, and that if he does his sureties will pay the debt," &c. Not one word as to surrender. It is evidently the old bond prior to the abolition for debt the codifiers were unwittingly manipulating, subject to the limitation of 8 days added by 12 Vict., sec. 12, but there is no such reserve in the case. Then comes art. 825, by which the Defendant may at any time before judgment give security that he will surrender.

Notwithstanding the serious character of this criticism, it seems to me that we must put such an interpretation on the acts as will give effect to the intentions of the Legislature. In the first place we have the articles 2274 and 2275 of the C. C. which lay down the rule that the fraudulent debtor who has given bail or gone to gaol, can only escape from coercive imprisonment by the statement under oath without fraud and the abandonment of his property. Then article 2274 refers to the Code of Civil Procedure for the form of proceeding and to the chap. 87, C. S. L. C., for the cases in which the proceeding may take place. Now, if we look back to chap. 87, we find sec. 12, §2 provides for the imprisonment of Defendant if he neglects to file such statement *in punishment of his misconduct.*

The C. C. P. seems to have no article precisely corresponding, but it is evidently contemplated by article 793. I therefore think the judgment should be reversed and the Defendant be compelled on pain of punishment to give the statement and make the abandonment required by the Civil Code, else we must decide that the articles of the Civil Code to which I have just referred are useless for want of an express mode of procedure being laid down by the Code.

BABY, Juge, *Dissentiens*, concourt dans les observations de M. le Juge Ramsay.

Jugement confirmé.

DeBellefeuille & Bonin, avocats des appelants.

Pelletier & Jodoin, avocats de l'intimé.

MONTRÉAL 20 JUIN 1881.

Coram DORION, J. C., MONK, RAMSAY, CROSS, BABY, J. J.

No. 152.

B. A. TESTARD DE MONTIGNY,

Demandeur en Cour Inférieure,

APPELANT ;

ET

LA COMPAGNIE D'ASSURANCE AGRICOLE DE WATERTOWN, N.Y.,

Défenderesse en Cour Inférieure,

INTIMÉE.

JUGÉ :—Que les parties qui, dans un incendie ou autre sinistre, procèdent à l'amiable à l'estimation des pertes, sans requérir l'observation des formes sur lesquelles ils auraient le droit d'insister, renoncent par là même à s'en plaindre plus tard, et le rapport des experts ne sera pas mis de côté lorsque les parties n'auront pas insisté sur ces formalités.

Cette action a été portée sur une police d'assurance, émise par la Compagnie d'Assurance Agricole du Canada le 15 janvier 1876, par laquelle cette compagnie a assuré, pour l'espace de trois ans, cinq immeubles au montant de $14,950. Plus tard la compagnie défenderesse a assumé le risque de la Compagnie d'Assurance Agricole du Canada à compter du 1er octobre 1878. Le 30 novembre suivant, deux granges assurées sous les numéros 4 et 5 et pour un montant de $1,350, y compris leur contenu, furent détruites par le feu.

L'appelant, dans un avis donné à la compagnie, a évalué les pertes à $1,907. Les parties n'ayant pu s'entendre sur le montant des pertes, ont nommé des experts pour en faire l'évaluation. Jean-Baptiste Galipeau fut nommé par la compagnie et Théodore Grignon par l'appelant. Ces deux experts, ne s'accordant pas, nommèrent Benjamin Deslauriers pour les départager.

Les pertes ont été estimées à $174.05 sur la grange numéro 5, à $348.70 sur la grange numéro 4 et à $273 pour le contenu

B. A. Testard de Montigny & La Cie. d'Assurance Agricole Watertown N. Y.

des granges, soit en tout à la somme de $795.75. Mais, comme par une clause de la police, l'intimée n'était tenue de payer que les deux tiers de l'estimation de la perte sur les bâtisses, elle a offert à l'appelant de lui payer seulement une somme de $621.50, savoir $116.03 pour la grange No. 5, $232.47, pour le No. 4 et $273, pour les effets qui étaient assurés et contenus dans les deux granges lors du feu. L'appelant, non satisfait de ces offres, a institué contre l'Intimée la présente action pour $1,173.

L'intimée a plaidé, par une première exception, que la police avait été émise sous l'impression produite par les fausses représentations de l'appelant ; par une deuxième exception, que l'appelant s'était rendu coupable de fraude dans l'évaluation de ses pertes ; par une troisième exception, que les pertes de l'appelant étaient dues à sa négligence grossière ; et enfin par une quatrième exception, elle a plaidé l'évaluation faite par les experts et elle a offert avec son plaidoyer la somme de $621.50, plus $24.60, pour frais d'évaluation, en tout $646.10.

DORION, Juge en chef.—Il n'y a aucune preuve des faits allégués dans les trois premières exceptions de l'Intimée, et la Cour Inférieure les a avec raison rejetées. Mais elle a maintenu la quatrième exception et elle a condamné l'intimée à payer la somme de $646.10. L'appelant se plaint de ce jugement et surtout de ce que les experts n'ont pas procédé régulièrement à l'évaluation des pertes.

Cette évaluation a eu lieu en vertu d'une clause de la police, que, si les parties ne s'entendaient pas sur le montant des dommages en cas de sinistre, il en serait référé à trois hommes compétents et désintéressés, dont un serait choisi par chacune des parties et le troisième par les deux autres, et que leur rapport serait obligatoire pour les parties. Les hommes choisis étaient compétents et, quoiqu'ils n'aient pas suivi toutes les formalités exigées par le code, leur décision ne peut pas être mise de côté, parce que les parties n'ont pas insisté sur ces formalités.

Lorsque les parties veulent bien procéder à l'amiable et ne point requérir l'observation des formes exigées par la loi, elles renoncent par là même à s'en plaindre plus tard. Ici les ex-

perts ont procédé de bonne foi et à la connaissance des parties, à l'estimation des pertes.

L'appelant n'a fait aucune objection à leurs procédés. Il n'a pas même demandé une nouvelle expertise. Les experts se sont accordés et quoique Grignon, expert nommé par l'appelant, allègue dans sa déposition qu'il y a eu malentendu, la Cour ne peut s'arrêter à une pareille déclaration contredite par le rapport qu'il a fait et le témoignage des deux autres experts.

L'appelant a fait entendre un grand nombre de témoins pour prouver que les granges incendiées valaient beaucoup plus que le montant alloué par les experts. La Cour Inférieure a préféré s'en rapporter à l'estimation faite par les experts eux-mêmes, et nous croyons que son jugement doit être confirmé.

Jugement confirmé.

Trudel, de Montigny, Charbonneau & Trudel, avocats de l'appelant.

Davidson, Monk & Cross, avocats de l'intimée.

MONTREAL, 20TH JUNE 1881.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY. J. J.

No. 136.

G. M. WILLEY,

Plaintiff in the Court below,

APPELLANT.

&

THE MUTUAL FIRE INSURANCE COMPANY OF THE COUNTIES OF STANSTEAD AND SHERBROOKE,

Defendants in the Court below,

RESPONDENTS.

W. W. Paige transferred to Appellant two insurance policies issued by Respondents. Subsequently the property insured was destroyed by fire, but after Paige had ceased to have any interest in such property. On a claim by Appellant to recover the amount of said policies.

HELD:—1st That the assignee of a policy issued by a Mutual Insurance Company can only exercise such claims as the transferor could himself have done;

2nd That in this case, Paige having ceased to have any title to the property insured, when the fire occurred, could not recover the amount insured under the policies aforesaid and that the Appellant is therefore debarred from such claim.

This action is for $1400, amount of an insurance on buildings insured under two policies issued by respondents, in

G. M. Willey & The Mutual Fire Insurance Co. of the counties of Stanstead and Sherbrooke

favor of W. W. Paige, who transferred them to appellant. The buildings were destroyed by fire on the 13th november 1877.

The policy No. 23,575 was issued to W. W. Paige, on the 8th september 1872, for the term of five years and for the sum of $2,300 distributed as follows:

On his barn....................................	$ 333	
Hay and grain therein	100	
Horses in said barn........................ ..	1000	
Harness therein..............................	125	
Summer and winter carriages and buffaloes..................................	742—	$2,300

On the 7th october 1874, Paige made the following application :

"Mr. A. G. Woodward, Sec.'y Treas. S. & S. M. Fire Ins. Co."
" Dear Sir,
" I wish the insurance of one thousand dollars on horses " in policy No. 23,575 cancelled and five hundred and sixty-" seven dollars to remain on my house and shed and one " hundred dollars on one of Wood's Parlor Organs, and three " hundred and thirty three dollars on furniture,

" Yours truly

W. W. Paige."

This application was forwarded to the company's head office and the policy returned with the following endorsement:

" At the request of assured the $1,000, on horses is held to " cover additional amount of $567, on house and shed of " policy No. 19,969; $100, on Wood's Parlor Organ therein, " and balance $333, to cover furniture therein, and not " otherwise.

" A. G. Woodward, S. & T.
" N. S. W."

" Oct. 9th 1874."

By this alteration the barn remained insured for $333, and the house and shed for $567. On the 13th May 1875, W. W. Paige obtained a second policy, insuring his dwelling house and shed for $500, and his furniture for $200, making his insurance amount to $1,400 on his house, shed and barn.

This policy was transferred to the appellant, as appears by the endorsement, which is as follows: " transferred in

security to Gilbert M. Willey, at date." The other policy was also transferred to the appellant and the transfer acknowledged on the back of it by the endorsement "transferred to G. M. Willey, the 29th may 1875."

The appellant was at the time a mortgagee on Paige's property, dating back to the 2nd of May 1874. After the fire the appellant claimed the amount of insurance on the house, shed and barn, to wit the amount mentioned in the two policies, numbers 23,575 and 19,969, to wit $900, in the first and $500 in the second, making altogether $1400.

The respondents pleaded to this action that the policy No. 23,575 was only to insure the buildings for $333 and that no change had taken place so as to transfer the portion of the amount for which the horses were insured upon the buildings and that this could only have been done by a new policy; further, that, at the time of the fire, the buildings did not belong to Paige, and that appellant could not recover, as he could claim no more than Paige himself could have done.

They then alleged that on the 11th March 1876, a writ of attachment in insolvency had issued against Paige, addressed to J. Wood, official assignee; that Wood was vested with the property until the 10th april 1877, when he transferred it to S. W. Wiggin, the creditors' assignee, who, on the 10th sept. following, transferred it with the consent of the creditors, to C. J. Paige and H. W. Austin; that on the same day H. W. Austin, transferred his half share to C. J. Paige. They also alleged that in addition to this, the property was sold for taxes to A. H. Moore, on the 5th March 1877; that during all this time Paige refused to pay the premiums and assessments accruing under the policies, whereby they became null and void.

On this contestation the Superior Court dismissed Appellant's action, holding, 1st. That the secretary treasurer of the Respondents had no power and did not bind the Company by transferring the amount of $567 from the $1,000 insured upon the horses to the house and shed insured under policy No. 19,969. 2nd. That owing to the sale to A. H. Moore, under the provisions of the Municipal Code, Paige had ceased to have any title to the estate, and finally, that the transfers of the policies by the Secretary Treasurer to the Appellant were not made according to the by-laws of the Company.

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DORION, C. J., Without adopting all the reasons given by the Superior Court for dismissing Plaintiff's action, we have no hesitation, to say that the action was properly dismissed. It is not necessary for us to decide, whether or not the Secretary Treasurer of the Company had authority to change the insurance, which had been effected by W. W. Paige on his horses under policy 23,575, to an insurance on his real estate. We are rather inclined to beleive that this was done with full knowledge and assent of the directors of the Company. Certainly the contrary does not appear. The same may be said of the acceptance or consent to the transfer of the two policies to Appellant.

But the other ground that W. W. Paige had ceased to have any title to the property before the fire occurred is an insurmontable objection to the plaintiff's action.

The fire occurred on the 13th November 1877, and as far back as the 16th September 1876, Wiggin, as assignee to the insolvent estate of W. W. Paige, and with the consent of the latter and of his creditors, had assigned the property to C. J. Paige and W. H. Austin, and the latter had reconveyed his share to C. J. Paige. It also appears by the evidence, that on the 5th March 1877, nearly nine months before the fire, the property was sold for taxes.

It is alleged on behalf of the Appellant that this conveyance was made only to secure C. J. Paige and W. H. Austin, who were W. W. Paige's sureties, from loss, yet the transfer was absolute and conveyed to them the absolute title to the property.

This is quite snfficient to defeat the claim of the Appellant as assignee of Paige's insurance policies in a Mutual Insurance Company. We have so decided it in a case of *Harvey & al and the Hochelaga Mutual Fire Insurance Co.*, on the 15th February 1881.

In a mutual fire Insurance Company, the party insured becomes a partner or member of the Company. He is bound to give security for the payment of certain guarantee notes and the property insured is subject to an hypothec for any calls, which may be made on such notes. In case of an assignment of the policy unless the transferee assumes the liabilities of the transferor and is accepted as a partner by the Company, he remains a mere assignee of the rights,

which the transferor may become entitled to claim, and in case of loss he can only exercise such claims as the transferor could have exercised, if no transfer had been made of the policy. Now it is evident that W. W. Paige having ceased to have a title to the property could not claim from respondents the amount insured under the two policies mentioned in the pleadings, even if he had not transferred them to the Appellant. The Appellant is therefore debarred from such claim, and the judgment of the Superior Court must be confirmed.

Judgment confirmed.

Hall, White & Panneton, for appellant.

Brooks, Camirand & Hurd, for respondents.

MONTREAL, 26TH APRIL, 1881.

Coram, DORION, C. J., MONK, RAMSAY, CROSS and BABY, J. J.

No. 110.

THOMAS F. MILLER,

Defendant in the Court below,

APPELLANT.

and

ANNA MARIA COLEMAN & *vir*,

Plaintiffs in the Court below

RESPONDENTS.

Misses Coleman, mother of the female respondent, being executrix of her late husband's will, appointed the appellant and Francis Mullins executors of her last will and directed them to execute the will of her late husband and to act as tutor to her minor children, the respondent and her sister, to whom she bequeathed all her property.

Mullins and Miller both acted under the directions of Mrs. Coleman's will to administer her estate and that of her late husband, until Mullins left the country, in 1856, since which time the Appellant has alone administered the property left by Mrs. Coleman, and taken charge of her two children.

The respondent survived her sister who died a minor, and having become of age in 1868, gave to the appellant a full discharge of his administration of the property.

HELD, 1st. That Mrs. Coleman could not by her will appoint the appellant tutor to her husband's will.

2nd. That although the appellant was never duly appointed tutor to to the respondent, he was nevertheless, accountable to her, in the same manner as if he had been regularly appointed her tutor, he having acted as such under the directions of her mother's will;

3rd. That the discharge given by the respondent to the appellant in 1868, was null and void as it had not been preceded by a regular account rendered under oath, nor accompanied by proper vouchers.

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4th. That appellant was not entitled to charge interest on sums by him advanced for the care and education of the respondent, but that he was entitled to interest on all debts bearing interest, which he had paid above beyond the monies he had in his hands belonging to the estate.

5th. That instead of a balance of $41,278, which the appellant was by the judgment of the Superior Court condemned to pay to the respondent, as reliquat de compte, the respondent is indebted to him in a sum of $590.07 with interest since the 6th october 1875, the respondent being however entitled to one half of the Drummond street property in the city of Montreal, and to what may remain of the three small lots acquired from one Easton, in the town of Belleville.

Dorion, C. J.—This is an action of account and by the final judgment rendered on the 17th of october 1879, the appellant was condemned to pay to the female respondent the sum of $41,278 and interest from the 6th of december 1875, and to *contrainte par corps.*

The appeal is from this judgment and the facts which have given rise to the action are as follows:

Robert F. Coleman and Maria Mansfield Connolly were married, at Belleville, in Ontario, on the 4th of November 1841.

The issue of the marriage were two children, Susanna Luisa Coleman and Anna Maria Coleman, the female respondent, who was born in 1846.

Robert F. Coleman made his will, at Belleville, on the 10th of february 1842, giving to his wife the enjoyment of his property during her life or until she remarried, and the property to his children. He appointed his wife, Lewis Walbridge and Wm Hope, his executors, and died in 1852. Walbridge and Hope both renounced the executorship.

On the 11th of june 1853, Mrs Coleman made her will, at Montreal, whereby she bequeathed all her property to her two children and appointed the appellant and Francis Mullins, as her executors, authorising them to continue the execution of the will of her late hnsband. She, also, appointed them tutors to her children to take care of them until their marriage or their age of majority.

The appellant was then married to a sister of Mrs Coleman and was therefore the maternal uncle of the female respondent and of her sister.

Mrs Coleman died on the 25th of june 1853. Her property consisted of one quarter of lot No. 1, in the 1st range of the parish of Chateauguay. The children had besides, the property left to them by their late father which consisted of a

lot of land, with mill and two houses, at Belleville, against which there were several mortgages duly registered, amounting to about $5,000.

On the 12th of june 1854, Catherine Connolly, a sister of Mrs Coleman died intestate and her property consisting in one undivided half of certain lots of land in Drummond street, Montreal, went to her brother, Patrick Connolly, and to her sisters, Rosanna, Susanna and Sarah Connolly, and to her two nieces, the female respondent and her sister, as representing their late mother· The female respondent and her sister thereby became possessed of one fifth in the undivided half of said two lots of land in Drummond street.

On the 2nd of may 1856, Susanna Connolly, the wife of the appellant, made her will and bequeathed to him the undivided half of the lots of land in Drummond street, for the use and benefit of her nieces, the female respondent and her sister. Mrs Miller, Susanna Connolly, died shortly after.

In 1861, Susanna Louisa Coleman died a minor, leaving the female respondent as her sole heir.

Patrick Connolly died about 1862, intestate, and the female respondent, his niece inherited of one fourth of his estate, which consisted of his share of the Chateauguay farm and of one fifth in one undivided half of the Drummond street lots.

On the 3rd of august 1864, Sarah Connally gave to the female respondent, her share in the Drummond street property, which apparently consisted in one fifth and one fourth in another fifth of one undivided half of said lots. The appellant accepted this donation for the female respondent and assumed, in the deed, the quality of tutor.

In july 1867, the female respondent became of age, and on the 21st of april 1868, she married Louis Edmond Amedée Globensky. They are seperated as to property. A few days before her mariage, that is, on the 9th of april 1868, the female respondent gave a full discharge to the appellant, as having been executor to her mother's last will, she acknowledging by this discharge that he had rendered to her a true and faithful account of his administration.

On the 2nd of november 1868, the female respondent being authorised by her husband, sold to the appellant all the rights and shares she had in an undivided half of the Drummond street property, for $5000, which sum she acknowledged to

have previously received. It is admitted, however, by the appellant that he then only paid to her a sum of $360, leaving the sum of $4,640 to be accounted for.

The property sold by this deed was not the undivided half bequeathed by Mrs Miller to the appellant for the use of her nieces, but the shares which came to the female respondent by the death of Catherine and Patrick Connolly, by the donation from Sarah Connolly and by the decease of her own sister. This appears from the terms of the deed and from the fact that the appellant claimed the other half as having been bequeathed to him by his wife. These shares consisted in one half, or about one half, of the undivided half of the lots of Drummond street or one fourth of the whole.

The female respondent alleging in her declaration that the appellant had had the management of all her property since the death of her mother (25th of june 1853,) that the discharge of the ninth of april 1868, was null, having been obtainedby fraud and without a previous account by the appellant of his administration of her estate and property, and that the sale of the 2nd of november 1868 of the Drummond street property was also null, as having been made to the appellant, before he had rendered an account of his administration, and further that the appellant had in his hands property belonging to her to the amount of $60,000,prayed that the discharge of the 2nd of november 1868, be set-aside, and that the appellant be condemned to account to her, for his administration of her property, or to pay to her $60,000, and that he be held to be *contraignable par corps.*

To this action the appellant pleaded: 1st cumulation of action, in as much as the respondent asked by the same action an account of appellant's administration and the rescision of the deed of sale of the 2nd of november 1868.

2ly. That the respondent sold her share of the Chateauguay property on the 9th of june 1875 and that he never had the administration of it, nor received any rent from said property.

3ly. That Susanna Connolly, his wife, had bequeathed the one undivided half of the Drummond street property to him and that she had authorised him to dispose of it, for the interest of the respondent and of her sister, and that under that

bequest, he was entitled to the enjoyment of that property during his life.

4ly. That the Belleville propertv was sold by the sheriff, on the 15th of february 1865, to John Bell, for $300, and a deed given of it on the 6th of october 1865, and that he, the appellant, had purchased the property from Bell, in 1868.

5ly. That the respondent has given him a full discharge, on the 9th of april 1868, and he further denied all the allegations of the declaration.

On the first plea, the Superior Court held; that there was cumulation of action and ordered the respondent to make her option, between her action *en reddition de compte* and her demand to annull the sale of the 2nd of november 1868.

I cannot understand on what principle, such a judgment which appears to me to be at variance with the most elementary rules of French procedure, could have been rendered. If the discharge is null, the appellant is bound to account to the female respondent for all the property he has belonging to her and if the sale is also null, the property sold forms part of the property for which he has to account, as well as regards the property itself, as for the issues and profits, he may have derived from it. Yet, as the respondent has not appealed from this interlocutory judgment, but has made her option to proceed with her action *en reddition de compte*, we have now nothing to do with that part of the action which has been abandoned.

On the 29th of december 1871, the discharge given by the respondent was held to be valid and her action was dismissed.

This judgment was reversed by the Court of Review, whose judgment was confirmed by this Court, and the appellant has been condemned to render an account of his administration. By some oversight, the Court of Review did not formally declare the discharge null and void, and as its judgment was confirmed as rendered, there was no express adjudication setting aside the discharge, although, it was virtually annulled by the order given to the appellant to account, on the ground that he had not previously properly accounted for his administration of the respondent's property.

On the 6th of october 1875, the appellant, in pursuance of this judgment rendered an account, by which he credited

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the respondent with an amount of $12,224,05 including $4640 being the balance of the sale of the Drummond street property, and he charged her with a sum of $33,116.82 for disbursements and interest, leaving a balance in his favour of $20,892.77, which he claimed by an incidental demand.

In this incidental demand the appellant has raised the objection that the action should have been brought in Ontario, where the property administered by him was situated. If there was anything in this objection, it should have been urged as a plea to the jurisdiction of the Court, and not by an incidental demand; but in neither form, is it a valid objection. The action to account is a personal action, which can be brought either at the domicil of the party accountable, or at the place where he was appointed to the office which makes him liable to account. The domicil of the appellant is, at Montreal, and it is here that, by the will of Mrs Coleman, he was appointed executor to her last will and tutor to her children. Although this capacity of tutor was never regularly conferred upon him as required by law, (art. 249 and 922 C. C.) yet he in that capacity accepted the donation made to the respondent by her aunt Sarah Connolly on the 3rd of august 1864 Whatever may be the interpretation to be given to art. 922 C. C. the action was well brought, at Montreal, where the appellant had his domicil and where he was appointed executor to Mrs Coleman's will.

As regards the property and revenue to be accounted for, it is admitted the appellant never meddled with the Chateauguay property, which was sold by the respondent, that after she had become of age, and that the appellant never received any rent or profit therefrom.

The Drummond street property has not yielded a revenue sufficient to pay for the taxes and fences, and the appellant claims that he has paid several sums of money for this property, which was managed by Dr. Leprohon, and that there is still due him a balance of $180.

The only remaining property is the Belleville lots with mill and two houses, from which the appellant admits he has received $4,658.07 of rents, issues and profits.

The mill was leased in 1847, by Mr. Coleman to one Easton for 10 years, at the rate of $400 a year, this included the wooden house attached to the mill. The stone house was leased

for $100 a year to one Blacklock. The appellant says that Francis Mullins, the other executor, alone managed this property, and received the rents from the death of Mrs Coleman in 1853 to the 19th of september 1855, when he (the appellant) received $89 from Blacklock. The appellant further states that the mill was always leased for $400, except in 1859, when it was leased to Wallace for $800, and in 1864 and 1865, when it was leased for $300. This included the wooden house, and the stone-house was always leased for $100, except in 1856, when it was rented for $140 and in 1857 for $120.

The appellant acknowledges having received altogether for rents, issues and profits from the mill and houses the above named sum of $4,658.07.

The Court below has charged him with $18,600, that is $13,941.93 more than he has admitted.

The rent for 1852, which is charged to the appellant by the judgment of the Superior Court, is not claimed by the action, and it appears by the evidence, that, from the death of Mrs Coleman, june, 1853, to 1855, Francis Mullins alone administered the Belleville property and received the rents.

As the executors are only responsible for what they have actually received or ought to have received and are not jointly and severally responsible for each other's administration, (art 913 C. C. *Darling* & *al* & *Brown* & *al*, 2 Supreme Court Rep., 26.) the appellant is not accountable for the rents so received by Mullins.

On the 30th of september 1865, the Belleville property was sold by the sheriff to John Bell. The appellant aknowledges that from 1855 to 1865, when the property was sold, it was leased for $5,640, but that he has only been able to collect $4,658.07—and that he has received nothing since. There is some doubt about a cheque of $100 sent by Wallace to Miller in february 1861, and for which the latter has not given credit, Miller says that either the cheque was not paid or that it is the same sum credited in may, when he returned from Florida. This $100 is not included in above amount. In 1868, Bell reconveyed the property, but the appellant contends that he then purchased it for himself. It, however, appears, by the evidence, that on the 29th of september, 1865, the day previous to the sale of the mill by the sheriff, Bell drew on the

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appellant for $545.38 being the amount of his claim, and that it was understood that Bell would, after purchasing the property, reconvey it to the appellant for the respondent. The appellant's letters leave no doubt on this point. The appellant accepted and paid Bell's draft, and afterwards insisted on a reconveyance of the property, which was only effected in 1868. This reconveyance must be considered to have been made for the benefit of the respondent.

The rent for 1865 was $300. The appelant says the property was then in the hands of the Sheriff and that he has received no rent.

I think, however, that as the appellant has repaid Bell his claim about the time the Sheriff's sale took place, Bell must have held the property for him from 1865 to 1868 and must have accounted for the rents, as he was bound to do; and if he did not do so, it must have been owing to the negligence of the appellant, who in either case is responsible for such rent. The mill was then in a bad state of repairs and could not yield more than it did in 1864 and 1865, that is $300 per annum. This would give $1200 for the four years of 1865, 1866, 1867 and 1868 and four hundred dollars for the rent of the stone house during the same period, in all $1600

There is moreover the rent for 1869 and 1870, which at the same rate, would give $800, the property having been sold to Diamond on the 11th of September 1870.

These sums of $4,658.07, $1600 and $800 would make altogether a sum of $7,058.07, for which the appellant is accountable for rent.

In 1870 the appellant sold the Belleville property for $6,250 to Diamond. From the evidence this would appear to have been a fair price. There is no evidence of fraud. There were debts to be paid and in the absence of fraud, the appellant is only bound to account for the price he received, $6,250.

On the 2nd of Nov. 1868, the respondent sold to the appellant her rights and shares in one undivided half of the Drummond street property for $5,000 and received in cash $360, leaving a balance to be accounted for of $4,640.

The debit side of appellant's account consists.

1 Of the sums received for issues and profits..........	$7,058.07	T. F. Miller & Coleman et vir
2 Of the price of the Belleville property..................	6,250.00	
3 Of the balance and of the price of Drummond St. property	4,640.00	
	$17,948.07	

The credit side consists of the sums paid by appellant as follows:

1 Amount admitted by the *débats de compte*............	$6,045.00
2 Louisa's board for 1853, 1854, 1855....................	400.00
3 do at the Providence 1856–7..............................	97.70
4 " " " " 1859, 1860..........................	133.60
5 " at St. Vincent de Paul 1859..........................	85.50
6 " " " " 1855-6..........................	24.00
7 " of Mrs. Coleman and Louisa 1853..................	180.00
8 Paid Atheneum Ins. Co....................................	84.00
9 " Mrs Leprohon..	18.50
10 " Birks and Co..	1.40
11 " Miss Burroughs...	30.75
12 " Beacon Insce. Co..	91.50
13 " Dr. McCullock...	247.25
14 " McDonald & Co...	7.50
15 " Mathewson's a/c..	16.00
16 " J. and T. Bell..	7.40
17 " Wm Benjamin's a/c....................................	49.65
18 1858 trip to Murray Bay..................................	23.25
19 1860 " " "	12.00
20 1862 " " "	30.00
21 Paid Dr. Fremont..	50.00
22 " Mrs Tassé..	19.42
23 " Smith & Co...	6.80
24 " Hodson.	5.00
25 " for Books..	10.00
26 " Jourdain's Bill..	4.25

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27	Paid H. Morgan & Co	39.93
28	" J. B. Hôulé	5.00
29	" Mde Tassé	20.00
30	" Dawson & Co	3.00
31	Sewing machine	65.00
32	Paid Leblanc & Cassidy	32.00
33	" Respondent	500.00
34	" Ryland	7.20
35	" A & W Robertson	78.50
36	" Mde Tassé	20.00
37	" Farrell	3.00
38	Balance paid for taxes and fences of Drummond Street property	180.00
39	Paid John Bell	545.38
40	" Appellant's Judgt against Mrs Coleman	2014.14
41	" O'Hare's Judgt	420.00
42	" Trust & Loan Co mortgage	1600.00
43	" Interest for 1856 and 1857 paid Trust & Loan Co	256.00
44	" Equitable Fire Ins. Co	40.00
45	Amount of interest to which appelant is entitled as per statement	5028.47
		$18,538.14

All the above items with the exception of items 40, 41, 42, 43, 44 and 45 have been admitted by the Respondent, some of them by the débats de compte and admissions, and the others, at the hearing of the case.

The current expenses always exceeded the receipts and the appellant has charged a large amount of interest on his disbursements. The appellant having incurred those expenditures without legal authority, since he was not duly appointed Tutor to the Respondent and was not authorised to borrow or spend any money on her account except in connection with his administration as executor, he cannot be treated more favorably than a duly appointed Tutor (Aubry & Rau vol., 1 p. 368). He is not, therefore, entitled to any interest on the balances which

were from time to time due to him. (Art. 313 C. C.) He has, however, the right to claim interest on the debts and which bore interest, which he paid in the interest of the minor, to prevent the sale of her real estate as well as upon the amount fo the Judgment he held against the estate (Aubry & Rau vol., 1 p. 472, note. 6 ; Larombière, on art. 1251 C. N. No. 59. ; Mourlon, Revue de droit Français et étranger, vol. 1, p. 808. ; Demolombe, vol. 27, p. 285, No. 332 ; Art. 1724 c. c.

The appellant is therefore entitled to interest on the following items :

STATEMENT.

1	On amount paid John Bell, $545.38 from 10th nov. 1865 to 11th sept. 1870, 4 years and 300 days.........	$131.96
2	On amount of appellant's judgment for $2014.14 from 21st may, 1853, to 11th sept. 1870, 17 years 111 days......	2090.91
3	On amount of O'Hare's judgt. for $420. from 26 august 1852 to 11th sept 1870, 18 years and 16 days.	454.70
4	On amount of Trust & Loan Co's mortgage of $1600, from 28th may 1857 to 11th sept. 1870, 13 years and 115 days......	1251.06
5	On $256 paid to Trust and Loan Co for interest in 1856 and 1857, 14 years......	$215.00
		$4143.67

This sum of $4143.67 deducted from the $6250 received by the appellant on 11th of sept. 1870, leaves a balance of $2,106.33 to be deducted from the sum of $5,015.14, leaving a balance of $2,908.81, which bears interest from 11th sept 1870, to 6 oct. 1875, date of producing the account, 5 years 25 days........... .... 884.80

Amount which appellant is entitled to charge for interest......................................$5028.47

The amount to the credit of the Appellant as above is $18538.14..18538.14

The amount to his debit is $17,948.07....................17948.07

$590.07

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Leaving a balance of $590.07 which the appellant is entitled to claim with interest since 6th of oct. 1875.

The only contested items admitted in favor of the appellant in the above statement are.

1	Appellant's jugt against Mrs Coleman.................	$2014.14
2	O'Hare's Judgt...	420.00
3	Trust and Loan Co's mortgage..........................	1600.00
4	Interest paid to Trust and Loan Co. 1855–6, and 7..	256.00
5	Bal. of disbursements on Drummond St. property..	180.00
6	For insurance..	40.00
		$4510.14

These sums were clearly due, and there is no reason to reject them from the credit side of the a/c, and, as the three first items bore interest, the appellant is also entitled to interest on those items.

The claim of the Respondent for higher rent than what appellant has admitted is rejected, because it is proved that Mullins received the rents from 1853 to 1855, and it is not proved that appellant has received from 1855 to 1864 more than what he has admitted.

There is no proof of any negligence on his part. From his letters it would seem that he was very pressing and if he could have collected more, no doubt he would have done so. His administration was difficult. It wás gratuitous, and he has lost a large amount for interest on his advances.

These are considerations which ought to induce the court to make a fair allowance in his favour.

On the other hand I have not allowed to appellant the note for $1192 given by Mrs Coleman to Mullins and by him endorsed to the appellant, nor the £400 equal to $1600 mentioned in Mrs Coleman's memorandum book.

Mullins administered the Belleville property from 1852 to 1855. He received the rents without accounting for them, and the note must have been paid or compensated by what he received. The note has been long ago prescribed. Moreover the appellant, who has assumed the duties of a Tutor, could not purchase this note, and claim it against the Respondent.

As to the £400, the entry in the book is very imperfect and subsequent to it, the appellant sued and obtained a judgment for £500 only, leaving out the £400. I consider this was an abandonment of the remainder of his claim if he had any.

On the whole, the judgment of the Superior Court should be reversed and the appellant condemned to deliver out to the Respondent the one undivided half of the Drummond street property coming from Mrs Miller, as well as any right and interest he may have in three small lots of land situate at Belleville, which have been transfered to him and Mullins by one Easton, and all the papers and documents which he has belonging to the estate.

The Respondent should be condemned to pay to the appellant the sum of $590.07 with interest from the 6th of october 1875, each party paying his own costs of the court below and the Respondent paying the costs on the appeal.

Ramsay, J.—The first question that presents itself on this appeal is as to the extent of the appellant's responsibility. Without a clear idea as to this all attempts to arrive at any satisfactory conclusion must fail. Fortunately we have to examine the question independently of the dispositions of the Civil Code, which has introduced a new rule (Art. 1064), the effect of which, has not yet been defined, and which, from the exceptions to Arts. 1045 and 1710, it is evident the codifiers did not perfectly realise.

The appellant's responsibility has to be considered in two ways: first, as to the nature of his duty, and, second, as to the penalty for failing to perform it. With regard to the first, it is immaterial to examine whether appellant was a pro-tutor, or whether he is a *negotiorum gestor*. Practically he is bound to the same care in either case. If he be considered as bound like a tutor, he is bound to use the care of a prudent administrator—he is liable for bad management (290 C. C.); if he be a *negotiorum gestor*, he will be protected by the circumstances under which in this particular case he assumed the responsibility. Poth., Mandat, 211. As to the discharge and the penalty for failing to pay the *reliquat de compte*, it is very material to the appellant whether he be held

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bound as a tutor, or whether he be considered as an ordinary *negotiorum gestor*. I refer especially to Arts. 311 and 2227.

It has been argued that there was no such quality known to the law as a pro-tutor, and that the rule of Art. 311 C. C. cannot be extended beyond the person having the quality; that Miller could not be a pro-tutor, even if such a quality did exist, inasmuch as he had not the charge of the person of the minor; that as regards the Upper Canada property, he acted as the executor of Mrs Coleman's will; that as regards the Drummond street property, he acted as the fidei-commissary legatee under his wife's will, and, consequently, that he is not accountable to the respondent, as regards these properties, in any other capacity.

The interlocutory judgment of this Court, confirming purely and simply the judgment of the Court of Review, gave no special quality to Miller. It ruled that the account rendered by him without vouchers and the discharge by appellants was null. In effect it applied the principle of Art. 311 C. C. And here two questions arise: (1) Can we alter that judgement if it be wrong? (2) Is it wrong? The difficulty as to the liability of one acting as a tutor, who is really not a tutor, is not a new one. D. 1. 1, *de eo qui tutore.* It seems, however, to me to be a pure subtilty, the falsity of which is in some measure concealed to us by the word pro-tutor. There is really no such capacity. The Roman law speaks of a quasi-tutor, never of a pro-tutor. Ulpian thus sets forth the difficulty, such as it is:—" *Quia plerumque incertum est, utrum quis tutor, an vero* QUASI TUTOR *pro tutore administraverit tutelam.*" (Ib.) He was a tutor *de facto*, whether he acted believing himself to be a tutor, or that he knew himself not to be a tutor, " *sive se putet tutorem, sive scit non esse.*" (Ib., § 1.) And he who is not a tutor, but who has acted as such, be proceeded against before the pupil had attained the age of puberty, " *quia tutor non est.* " (Ib., § 3.)

Here then we find the direct action to account as a tutor given against one acting as a tutor, when it could not have been open against the tutor, avowedly because the former was not a tutor. Of course we cannot find any authority in the Roman law directly bearing on the rule of Art. 311, because under the Roman system no such case could happen. On arriving at puberty, when the tutorship determined, the

curator protected to some extent the minor, and when the curatorship determined, the minor become major was not subject to the personal control of the curator. But by the authority of the Roman law, I think the true principle is establised so as to leave no difficulty as to its application. (Paul Sent i. iv, 8.) On this text Hvshke says that calling the action that of pro-tutorship is an error. Again, as to Miller's quality, there might be some question, for there is a certain ambiguity as to the control he had over the minors. But this ambiguity disappears when we find that the appellant actually took the quality of tutor in a deed. He says this was done inadvertently; but that excuse is scarcely admissible, when the declaration is taken in connection with the other facts.

We next come to the distinction appellant seeks to establish as to the Upper Canada property. He has certainly something to say, but it does not appear to me that his pretension, as explained at the argument, can be sustained. Having the quality of executor under the Upper Canada law, Miller's administration there will be governed by that law and not by the law of Lower Canada, if they be different. But when the tutor into whose hands the result of the administration has passed comes to render his personal account of his tutorship, he does it under our law. It is impossible that he can turn round to the minor and say, "I have confused two capacities in which I was acting, and I shall therefore give you an imperfect account." It seems the same may be said of his administration of the Drummond street property. But really these questions are of little practical utility in the present case, for Miller has tendered an account of his administration both in Upper Canada and in Drummond street. Taking this view of the liability of Miller, it is unnecessary to enter upon the question as to whether this Court could reform its previous judgment, and discharge Miller from the obligation to account anew, notwithstanding the discharge.

One other question remains, and it is whether a quasi-tutor like Miller is liable *par corps* for the *reliquat de compte*. If he is a tutor *de facto*, I cannot see how he can escape from the operation of Art. 2272 C. C. If he is not a tutor *de facto*, then he cannot come within the operation of Art. 311. It does not seem to me that any logical distinction can be made.

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Having defined Mr. Miller's legal position, we next pass to the consideration of his liability under the evidence of his administration. It strikes one as something remarkable that between 1852 and 1875 an estate, absolutely unprofitable, should have maintained first three, then two, and finally one person generously, as it is admitted, and have grown up to $41,278, and this without any very notable accession of fortune. The three sources of the wealth were, the Upper Canada property, the Drummond street property, and the wardrobe of the late Mrs. Coleman. There is absolutely nothing beyond this, for it is expressly admitted that the Chateauguay property produced nothing till it was sold by respondent, who got the whole price. As for the Drummond street property, it produced nothing. If no part of that property had been sold, the judgment ought to have gone to the effect that Miller should deliver over to respondent her share of the property. But there is a curious incident of the suit. Respondent asked to have a deed of sale to Miller of part of the property set aside. Miller objected to the conclusions of the declaration, and moved that respondent be obliged to select whether she would have an account or the deed set aside. Strange to say he was successful in this motion, and respondent did select and abandoned so much of her action as tends to set aside the deed of the part of the Drummond street property.

Respondent now contends that this judgment does not really affect the question; that Miller having to account, he was obliged to account for the loss on the bad and fraudulent sale to himself, and therefore that the deed might stand as a transfer of the property and still Miller remain bound for the mal-administration.

This is very ingenious, but it seems to me that the position is not a sound one, and that it wars against the fundamental principle that you cannot seek the same thing twice. Respondent cannot hold to the sale, and ask appellant to pay a different price from that stipulated in the deed. It would also sin against another disposition of the positive law; it would be to prove *outre le contenu de l'acte*. The case of Halcro and Deslesderniers (2 L. C. R., p. 325) has been cited. That case, so far as it has any bearing on the matter before us, goes no further than to say that a deed, to which the defendant is a

party, may be set aside by exception and withont an incidental demand, provided the conclusions of the exception are sufficient. Here the conclusions were sufficient if they had been let alone; but by an interlocutory judgment, acquiesced in by respondent, they were struck out. This is to be regretted, for the Court is now in rather an awkward position. The action stands as an action to account, and therefore it seems we must deal with the price of sale, and in doing so we cut respondent out of the action to set aside the deed, for she had one of two actions, she has not both. Again, if we reserved her right to set the deed aside, we might be reserving a remedy which is no longer available. I think, therefore, that the issue as regards the property sold is narrowed down to the price stipulated in the deed.

But here another difficulty presents itself. The part sold does not end the questions as to the Drummond street property. It does not clearly appear what Miller bought from Mrs. Globensky. The deed purports to convey "all the rights, share, claim, title and interest which she, the said Anna Maria Connolly Coleman, has or can, have, or pretend in or to any part or parts of the one undivided half of two lots, &c., &c. At the time this deed was made, Mrs. Globensky had a claim to one undivided half under her aunt Mrs. Miller's will, and she had also by succession, donation and will from her uncle and other aunts 8–30ths of the property. There is some room for doubt; but I think we must interpret the deed to be a conveyance of the shares of Mrs. Globensky in the undivided half coming to her from other sources than Mrs. Miller's will. In the first place, there could be no question of shares as to the undivided half coming from Mrs. Miller, whereas the shares coming to her from other sources are a little difficult to calculate, and there may have been doubt as to their extent. Again, the parties declare in the deed that Mrs. Globensky is then seized by good and valid titles of the property she sells; strictly speaking she had no title in that sense to Mrs. Miller's half. Miller was seized of it until he gave a title, and although this distinction has hardly any result under our system, the position of the half share not being theoretically in accordance with the deed it helps us to interpret the deed. Miller has, therefore, to account for the half com-

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ing to Mrs. Globensky from Mrs. Miller, and we think he should be condemned to pay that half to her. Substantially, then, we have to examine as against Miller the revenues or negligence as to the Upper Canada property. No negligence is proved. I fully concur with the learned Chief Justice on the principles he has explained, being those which ought to guide us in deciding the details of the case.

I may specially say that the entry of £400 in Mrs. Coleman's handwriting in a roughly kept book does not appear to me to be a title. It will be observed that this is not an entry depending on Miller's administration, and consequently his oath cannot help him. What he had to prove was a title to this debt, which he has not got. It is not unlikely Miller's story is true from the relations existing between the parties at the time; but we cannot be guided in a matter of this sort by impressions. Again, if the loan was made to Mrs. Coleman, Miller seems to have abandoned it by bringing an action for a similar debt and omitting this claim. Such an abandonment is readily presumed.

With regard to the other debt due by Mrs. Coleman, I think Miller should have credit for it. It has been said that as he made no inventory he cannot charge it. That is not what the law says. If a tutor makes an inventory and does not mention a debt due to him, and of which he has knowledge, he cannot charge it later, because the inventory stands as an admission, either that he has abandoned the debt or that the debt does not exist. Again, if he makes a payment for the minor out of his own money he gets no interest on the advance, except when he pays a debt bearing interest, and then he gets interest at the rate of six per cent. This is a very rigid rule, and from its very rigidity might be injurious to the minor, nevertheless it is probably the safe rule, and it is certainly the rule of law. Among the old writers we find it laid down that if the minor's income is insufficient for his support, his own services must be employed to take out his income. Our social ideas would have been not a little outraged if Mr. Miller had taken this young lady from school in order that she might do something for her own support. Mr. Miller's position was, therefore, a difficult one: but he had a remedy. He could have obtained an authorization to borrow money or to advance it. This he did not do, and now the es-

tate cannot be charged with interest. We refuse Miller interest on all his advance. T. F. Miller & Coleman et vir

The learned Chief Justice has entered very minutely into the details of the receipts and expenditure, and I concur with him in the result at which he has arrived. I find, too, that the conclusion to which the Court has come is substantially supported by the evidence of Mr. McDonald, the accountant. As has been remarked, his calculations cannot always be used because in dealing with the figures he admits what we cannot legally allow, and therefore much of his labor is lost; nevertheless his evidence helps us to a conclusion, or rather his calculations fortify us in those conclusions at which we have arrived. If we are to have many such cases it will become necessary for us to adopt some more stringent rules as to practice than those usually followed in actions to account in our Courts. The account here is not in the form required by law.

The Honorable Mr justice Baby, dissenting, was of opinion of confirming the Judgment of the Court below.

Judgment reversed.

W. Robertson, for appellant.

S. Bethune, Q. C. and Joseph Doutrè, Q. C., counsel.

Lacoste and Globensky, for Respondent.

QUEBEC, 7TH DECEMBER 1881.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS & BABY, J. J.

THE QUEEN,

vs.

RICHARD MOORE,

HELD, 1st That in order to prove that a steamer upon which a crime has been committed was a British steamer, it is not necessary to file the register of the steamer and it is sufficient to establish that she sailed under the British flag.

2nd That when a person shall die in this Province from ill-treatments received while on board ship at sea, the trial for manslaughter of the author of such ill-treatment must take place in the district where that person deceased, and not in the district where the accused was arrested.

RESERVED QUESTIONS.

Richard Moore, second mate of the "Star of England," was tried before the Court of Queen's Bench, at Quebec, on an indictment for manslaughter. The facts of the case are that Moore ill treated on the high seas a seaman of the name of McKeown, *alias* Armstrong, so grievously that he had to be put on shore at Kamouraska, where he died, his death according to medical testimony having been accelerated by the ill treatment he had received.

Moore was arrested and tried at Quebec, where he was found guilty of manslaughter. On a motion in arrest of judgment, the presiding judge reserved three questions for the consideration of this Court.

First: Whether this proof was sufficient as to the ship or vessel "Star of England" being a British Ship?

Secondly: Whether McKeown or Armstrong having died in the District of Kamouraska, the prisoner could be tried in the District of Quebec, where he had been arrested?

Third: Whether the verdict should stand or be quashed and judgment arrested?

THE HON. MR. JUSTICE RAMSAY.—The prisoner was convicted of manslaughter at the last term of the Court of Queen's

Bench, Crown side, in the District of Quebec. He suffered ill-treatment on board ship at sea and died in the District of Kamouraska. The Queen v. Richard Moore

Two questions are submitted for the consideration of this Court. The third question is formal.

1st. Whether the proof is sufficient as to the ship "Star of England" being a British ship.

2nd. Whether on the statement of the case as reserved, more particularly from McKeown or Armstrong having died on land in the District of Kamouraska, and the prisoner having been arrested in the City and District of Quebec, he could be tried in the District of Quebec for the crimeof manslaughter committed on the high seas.

We think on the first question that the evidence is sufficient, and possibly special evidence would not be necessary to establish that a ship sailing between two ports in the British Dominions was a British ship. It is not, however, necessary to decide that point, for there is ample evidence that the ship sailed under the British flag. If it was necessary to give proof that the register should be produced, a ship sailing without a register, or with a false register, would escape from all liability; while, on occasion, it might take all the advantages of a questionable nationality.

On the second question there is greater difficulty. By common law there was no jurisdiction in any Court to try an offender accused of an offence committed on the high seas or beyond the realm. (1 Chitty, 72 Law, 187.) And where the wounding and death were not both within the same county, the *venue* could not be validly laid in either. (3 Chitty, 733.) The inconveniences arising from these rules of the common law required to be remedied. By the 2 and 3 Edward VI., cap. 24, the *venue* is to be laid in the county where the party dies. This is a general rule and forms part of our law. By the 28 Henry VIII, cap. 15, authority was given to try, by process of common law, by commission under the King's great seal, any offence on the high seas, in any county in England. Shortly stated the 46 George III, cap. 54, extends the 28 Henry VIII, so as to allow the trial in any part of His Majesty's Dominions. To avoid questions arising on the Stat-

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utes, as to whether a man stricken on the high seas, but dying in England or stricken in England and dying on the high seas, could be tried for murder or manslaughter at common law, the 2 Geo. 2, cap. 21 was passed, and it provides that the accused can be indicted and tried in England where the death stroke or poisoning shall respectively happen. (1 Chitty, 155.) These acts are only of limited application, but they show the progress of legislation; but they do not furnish a rule for this case.

We next come to 12 and 13 Vic., c. 96, sect. 3. This act is general, and gives no jurisdiction to the Court sitting in the District of Quebec. It does give jurisdiction at Kamouraska. The 18 and 19 Vic., cap. 91, sect. 21 does not apply, for it refers to an offence wholly committed on the sea, then the accused may be tried where he is found. In the same manner the 30 and 31 Vic., cap. 11 only affects a British subject committing an offence on a British ship, and it empowers any Court in H. M. Dominions to try the offence as if it had been committed on board a ship within the jurisdiction of such Court.

We next come to our own statute 32 and 33 Vict., cap. 20, sect. 9, which provides for where a person in the position of the accused should be tried; and this statute seems to accord with the Imp. Act, 12 and 13 Vict., c. 96. We have not, however, to go beyond the question of whether the accused could be properly tried in this district, and on that point we are all clearly of opinion that there is no statute giving such jurisdiction, and that as the accused has not been tried by any Court having jurisdiction to try the offence, there has been a mis-trial.

THE HON. CHIEF JUSTICE DORION.—The reserved case shows that the deceased McKeown was ill-treated by Moore on the high seas, in a vessel sailing under the British flag, and that he died in the District of Kamouraska. On the first question I think it was not necessary to produce and prove the certificate of registry of the "Star of England," to establish that she was a British ship, in order to give jurisdiction to the Courts

in this Province, over crimes committed on the high seas on board such a vessel. If, therefore, the deceased had died on the high seas from injuries received on board of the ship, Moore would have been rightly tried in the District of Quebec, or in any other District in the Province where he might have been found.

McKeown, however, did not die on the high seas, but in the District of Kamouraska, and I have hesitation in saying that he could only be tried in the District where he died.

The Imperial Act 12 and 13 Vict., ch. 91, sect. 3, provides that if a person administers poison to, or strikes, on the high seas, another who dies in any of the colonies, such person shall be tried as if the crime had been wholly committed in the colony. If the crime had been wholly committed in the colony, the accused party might have been tried either in the District where the ill-treatment had taken place or where the deceased had died (32 and 33 Vict., ch. 29, sect. 8). But as it would be impossible to establish that the ill-treatment had taken place in any District in the Province, it follows that the trial could only take place where the death occurred.

Sect. 9 of the " Act respecting offences against the person " (32 and 33 Vict., ch. 20) also provides that when a person struck or poisoned upon the sea shall die in Canada from the effect of the stroke or poison, the offence committed in such case shall be tried in the District, county or place in Canada, where the death happens, in the same manner as if the offence had been wholly committed in that District, county or place.

I find therefore no difficulty in saying that the prisoner could not be tried in the District of Quebec, where neither the blows were inflicted, nor the death occurred.

THE HON. MR. JUSTICE CROSS.—In one of the Imperial Acts, jurisdiction is given where crime is committed on the high seas to try the party wherever he may be found. The only difficulty in the way of jurisdiction of this Court under that statute was that the crime was not wholly committed on the

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high seas but only partly. Consequently this rule to try the party wherever found does not apply. This rule as applied in England means undoubtedly, according to the authorities cited on the part of the Crown, where the party is tried, whether he is taken there by force or not, and the difficulty was, to a certain extent foreseen, at the time of the trial because the presiding Judge then recommended the jury to find on the second count of the indictment, that the prisoner had been guilty of inflicting grievous bodily harm.

The jury found him guilty of manslaughter. Consequently the difficulty was raised. There would have been no difficulty in the other case as the crime was committed on board the ship because there was cruel treatment on board the vessel. Had the verdict been on the second count in place of the first, it could not have been attacked as it has. The conviction is quashed.

J. Dunbar, Q. C., pro Regina.

John O'Farrell, for R. Moore.

MONTRÉAL, 29 NOVEMBRE, 1881.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS et BABY, J. J.

No. 1334.

L. A. SENÉCAL,

Demandeur.

ET

LA COMPAGNIE D'IMPRIMERIE DE QUÉBEC,

Défenderesse.

JUGÉ:—Que le tribunal dont la partie défenderesse a décliné la juridiction ne peut pas permettre au demandeur d'amender sa déclaration, tant que l'incident n'est pas vidé.

DORION, juge en chef, concourt dans le jugement, parce que l'amendement aurait été inutile, et non pas parce que le tribunal de première instance n'avait pas le droit de permettre l'amendement.

Le demandeur a porté cette action devant la Cour Supérieure, à Montréal, contre la compagnie d'Imprimerie de Québec, ayant son bureau d'affaires en la cité de Québec, où elle publie le journal " l'Electeur, " et il réclame $100,000 de dommages pour différents articles diffamatoires publiés dans ce journal.

La défenderesse a décliné la juridiction de là Cour :

1o. Parce qu'elle n'a pas été assignée à comparaître devant le tribunal de son domicile ;

2o. Parce qu'elle n'a pas été assignée dans le district de Montréal ;

3o. Parce que l'action n'a pas pris naissance dans le district de Montréal.

La cause était inscrite pour audition sur l'exception déclinatoire, lorsque le demandeur demanda la permission d'amender sa déclaration en y ajoutant, que les écrits dont il se plaignait avaient été publiés et mis en circulation dans le district de Montréal.

Cette demande a été rejetée sur le motif que, " la motion " faite par le demandeur demandant la permission d'amender " sa déclaration aurait pour effet d'attribuer à ce tribunal, " malgré le refus de la défenderesse d'y consentir, la juridic- " tion qu'il ne possède pas maintenant. "

Et " en outre que du moment que la juridiction est con- " testée, le tribunal ne peut passer outre à prendre connais-

L. A. Senécal & La Compagnie d'Imprimerie de Québec.

" sance d'aucune demande incidente ou autre, tant que la " compétence n'est pas certaine."

Le demandeur demande maintenant la permission d'appeler de ce jugement.

Dorion, Juge en chef.—La majorité de la Cour est d'opinion que, pour les raisons données dans le jugement même, le tribunal de première instance ne pouvait accorder la permission d'amender qui lui était demandée et que la permission d'appeler doit être refusée.

Pour ma part je ne puis admettre et surtout consigner dans un jugement que, du moment que la juridiction est contestée, le tribunal ne peut prendre connaissance d'aucun incident tant que la compétence n'est pas certaine, et surtout que le tribunal est dépouillé du droit d'adjuger sur une motion pour amender les allégués d'une déclaration.

Il est sans aucun doute, que le déclinatoire étant proposé, il doit être sursis à toute poursuite sur le mérite même de la demande jusqu'à ce qu'il ait été statué sur cette exception, parce qu'il faut avant tout savoir si le tribunal peut prendre connaissance de l'affaire ou non, mais il ne s'en suit pas que le juge saisi de la cause ne puisse régler tous les incidents se rattachant à l'instruction du déclinatoire, or la demande formée par le demandeur qu'il lui fût permis de réformer sa procédure vicieuse se rattachait d'une manière directe à l'instruction de l'incident, puisqu'il avait pour objet, d'écarter le déclinatoire.

Denisart, Vo. déclinatoire No. 3. Guyot, Rep. Vo. déclinatoire. Note au bas de la page 296.

Les amendements sont favorables parce qu'ils tendent à faciliter la décision des causes et préviennent la multiplication des procès.

" Au reste, parmi nous, on peut réformer sa demande en " tout état de cause." Guyot, Rep. Vo. demande, p. 473.

Telle a toujours été la règle que notre code de procédure civile a développée dans les articles 53-117 et 320.

Dans la cause de *Tildesley* & *Harper*, 39, L. T. 552, le Lord Justice Barmwell s'est exprimé comme suit : " As a general " rule leave to amend ought not to be refused unless the " Court is satisfied that the party applying is acting *malâ*

" *fide*, or that his blunder has done some injury to the other " side, which cannot be compensated by payment of costs or " otherwise."

L'on peut voir les exemples de l'application du droit de permettre d'amender soit que la Cour ait juridiction au mérite ou non, dans Archbold's Q. B. Practice t. 1, p. 239—mais surtout dans Lush's Common Law Practice p. 387 et 439.

Je ne conçois pas que si une partie qui, poursuivant le paiement d'un billet de $500 avait, par une erreur cléricale, omis le cent et demandé une condamnation pour cinq piastres seulement, une Cour de justice pourrait refuser à cette partie de réformer sa demande en ajoutant le mot " cent " sous le prétexte que le déclinatoire ayant été proposé, elle n'a plus de juridiction, et qu'il faut dans ce cas que la partie discontinue sa demande pour en recommencer une autre, après avoir payé une centaine de dollars de frais.

Une telle exception ne se trouve ni dans l'esprit ni dans le texte de notre droit. Si cependant le motif de la Cour Supérieure est fondé, il s'appliquerait à ce cas tout aussi bien qu'à la cause actuelle.

Je concours cependant dans le jugement qui refuse l'appel, mais pour un autre motif, c'est que l'amendement est parfaitement inutile en ce que la déclaration amendée ne donnerait pas plus de juridiction à la Cour que la déclaration originaire. En effet, dans sa déclaration, le demandeur se plaint d'écrits diffamatoires qui ont été publiés à Québec et il demande la permission de l'amender en ajoutant, que ces écrits ont aussi été publiés et mis en circulation dans le district de Montréal. Ce qui donne au demandeur un droit d'action, c'est la publication de ces écrits. Cette publication ayant eu lieu dans deux districts, son droit d'action a pris naissance dans deux districts et non dans le district de Montréal seulement. Il ne peut donc se prévaloir de l'art. 34 du Code de Proc. qui permet à un demandeur d'assigner son débiteur à l'endroit où le droit d'action a pris naissance pour porter son action dans le district de Montréal où la défenderesse n'a pas de domicile. S'il en était autrement, le demandeur, en alléguant que les injures ont été publiées dans tous les districts de la province, pourrait porter son action dans aucun des districts d'Ottawa à Gaspé, à son choix, ce qui n'a jamais été l'in-

tention de ceux qui ont fait le Code. C'est une règle bien établie que l'amendement n'est permis que lorsqu'il est utile.

La permission d'appeler est refusée.

F. X. Archambault, pour le demandeur.
Mercier, Beausoleil & Martineau, pour la défenderesse.

MONTRÉAL, 22 NOVEMBRE, 1881.

Présents: DORION, Juge en chef, RAMSAY, TESSIER, CROSS et BABY, J. J.

Ex parte WILLIAM POLLOCK,

Requérant pour bref d'habeas corpus.

JUGÉ:—1o. Que la Cour du Banc de la Reine n'a pas juridiction pour corriger, sur une demande d'*habeas corpus*, une erreur qui s'est glissée dans le bref de contrainte (*warrant of commitment*).

2o. Que la Cour d'Appel, en juridiction civile, n'a pas le pouvoir d'examiner sur bref d'*habeas corpus* les procédés de la Cour Supérieure.

Par DORION, Juge en chef:—Différant, que la Cour à le droit d'examiner sur *habeas corpus* s'il y a un jugement d'une cour compétente, qui ordonne l'emprisonnement, et si le *committimus* est conforme à ce jugement.

Le requérant était le défendeur dans une cause à la Cour Supérieure du district de Terrebonne, dans laquelle E. A. L. de Bellefeuille & al étaient les demandeurs. Dans cette cause, un bref de *venditioni exponas* avait été émané contre le défendeur, lequel s'était rendu coupable de rébellion à justice, le jour de la vente, en chassant l'huissier chargé du bref. Les demandeurs, en conséquence de ces faits, prirent une règle contre Pollock, et, après contestation, ce dernier fut condamné à l'emprisonnement jusqu'à ce qu'il payât les diverses sommes énumérées dans la règle, savoir :

1o. La dette, $25.00 ;—2o. les intérêts depuis le 31 Oct. 1879 ; —3o. les frais taxés à $215.82 ;—4o. les frais subséquents et frais sur *Vend. Exp.*, $45.35 ;—5o. et enfin, dit textuellement le jugement sur la règle, " *les dépenses et frais résultant de la* " *sentence, savoir, la somme de* $18.20. "

Le 14 octobre 1881, un bref de contrainte fut émané pour mettre ce jugement à exécution. Il énumère les diverses sommes que le défendeur est tenu de payer pour être libéré, et cela à peu près dans les termes de la règle, sauf qu'après

avoir parlé des frais subséquents et frais sur *Vend. Exp.*,$19.20, le bref ajoute $1, pour le bref de contrainte et les frais encourus ou à encourir pour mettre ce bref à exécution.

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Le 26 octobre 1881, le défendeur présenta à l'Hon. Juge Bélanger une requête pour *habeas corpus* dans laquelle il invoque, entre autres motifs, cette divergence entre les termes du jugement ordonnant la contrainte par corps et ceux du bref de contrainte. Cette requête ayant été refusée, le défendeur, le 18 novembre 1881, renouvela sa demande à la Cour du Banc de la Reine. La requête allègue les motifs suivants:

" That your said petitioner is detained in jail illegaly and that the said warrant of commitment under which your petitioner is detained is illegal and null and is in effect no warrant and that your petitioner is entitled to his liberty and should be liberated for the following among other reasons:

" Because your petitioner's domicile is in Mille-Isle, in the said district of Terrebonne, where your petitioner has resided for many years, and that he is not of Morin as described in the said warrant of commitment neither is Mille-Isle any part of Morin, nor Morin any part of Mille-Isle, the latter being a seigniory distinct and separate and for many years known as Mille-Isle, neither was Morin ever any part of Mille-Isle.

" 2o. That the sheriff to whom the said warrant was addressed did not arrest, nor attempt to find and arrest the William Pollock as described in the said warrant of commitment but illegally of his own knowledge arrested your petitioner.

" 3o. That the said warrant of commitment is in excess of the jurisdiction of the Court in as much as it orders your petitioner for such *rebellion à justice* as aforesaid to be detained in prison until payment of amount of the original judgment and costs without mentioning any term for such imprisonment or during the pleasure of the Court nor any other alternative but the payment of the judgment, debt and costs.

" 4o. That the said warrant of commitment is in excess of judgment in as much as it orders your petitioner to be detained for a sum and sums different to that ordered by the judgment of the Court, to wit: the sum of $215.00 for the costs incurred in the Superior Court in review, to wit: the costs incurred in two courts, while the judgment ordered

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detention until the payment of $215.80 costs incurred in the Superior Court, the Superior Court in review, and the Court Queen's Bench to wit: the costs incurred in three courts.

"5o. That the said warrant is in excess of the judgment in as much as it orders your petitioner to be detained till the payment of more money than is ordered by the judgment of the Court on the said rule as aforesaid, to wit: the sum of $1.00 for the warrant and also all costs incurred or to be incurred *à encourir* to put the present warrant into execution to wit the sum of $39.25 currency, which two latter amounts forming the sum of $40.25 are not mentioned in the said judgment of the Court in any manner whatever, nor is any mention made in the said judgment of costs incurred or to be incurred *à encourir* to put the present warrant into execution as illegally inserted in the said warrant as aforesaid.

"6o. That the total amount ordered by the judgment of the Court to be paid with imprisonment until paid was $305.37 while that claimed by the warrant amounts to $345.62.

"7o. That the said warrant of commitment is signed by the deputy prothonotary of the Court and not by a judge of the Superior Court or Court of Queen's Bench.

"8o. That your petitioner was arrested after seven of the clock in the afternoon to wit at or about half past eight."

M. Palisser, à l'appui de sa requête, cita :

Ex parte Martin 22 L. C. J. 88-1877.

Note to Desharnais *vs.* Bocage 4 L. C. Reports, page 43.

Ex parte Crebassa 15 L. C. J. p. 331.

" Prince Ibid. 332.

" Fourquin 16 L. C. J. p. 103 Q. B.

" Thompson 22 L. C. J. 89.

" Donaghue 9 L. C. Reports p. 285.

" Cutler 22 L. C. J. 85.

" McCaffrey, *Legal News* 1880, p. 106.

" Healey p. 53, *Legal News* 1878 and 22 L. C. J. p.138.

" Barber 8 L. C. *Reports*, 216.

" Gauvreau *Legal News*, 1878, p. 53.

M. de Bellefeuille, pour les demandeurs, résista à la requête; alléguant qu'il n'y avait pas lieu à *habeas corpus* dans l'espèce actuelle. Il cita à l'appui de cette doctrine :

Le code de procédure civile, art. 1052.

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Ex parte Donahue, IX L. C. R., 285.
" Whitfield, II R. de Lég., 337.
Barber V. O'Hara, VIII L. C. R., 216.
Ex parte Healey, XXII L. C. J. 138.
" Thompson, do., 89.
" Cutler, do., 85.
" McCaffrey, III *Legal News*, 106.
" Gauvreau, I *Legal News*, 53.

L'Hon. Juge Ramsay, prononçant le jugement de la Cour, dit :

The petitioner has been sent to gaol for *rebellion à justice* in a civil suit. He now comes before this Court as a petitioner for a writ of *habeas corpus* in civil matters. In another case, I have drawn attention to the fact that a *habeas corpus* in civil matters means in matters not criminal—that is to say, " in cases of confinement not for criminal or supposed criminal matter." Now, no one pretends that a commitment for *rebellion* in a civil suit is a civil matter. I mention this simply to avoid a confusion of ideas, for it has really no bearing on the merits of this application. The ground urged by petitioner for his discharge is that there is no judgment of the Superior Court to support the warrant on which he was arrested, but that the warrant for his arrest requires him to pay, in order to obtain his discharge, a greater sum than the judgment of the Superior Court has condemned him to pay, so that he cannot get his release without paying the gaoler more than he owes. This question was fully examined in the case of McCaffrey, but as the reasoning in that case appears not to be fully understood, it becomes necessary to enter more at large into the principles involved in that and the present decision. The petitioner has evidently in head the liberation of persons illegally detained on summary convictions by magistrates, or by courts of limited jurisdiction. In these cases, if a person is illegally deprived of his liberty, it is by an excess of jurisdiction ; and the prisoner procures a writ of *habeas corpus* from one of the Superior Courts of law, or from one of the judges, to examine whether there is a good cause of detainer. But what is asked of us now, is to examine on a writ of *habeas corpus* into the proceedings of Superior Court. It seems to be necessary once more to

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say that not only have we no revisory power, except by way of appeal, in appealable matters, over the Superior Court, but that the Superior Court, as the great Court of original jurisdiction of this Province, has primarily, and to the exclusion of this Court, revisory power over every tribunal of this Province, except over this Court. The title of this Court is a little misleading, nevertheless the whole general powers possessed by the Court of Queen's Bench, except its jurisdiction as a criminal Court, by the Common Pleas (in so far as they survive), and of the *Conseil Supérieur* (except its quasi-Legislative powers) have generally, and where not specially curtailed, devolved on the Superior Court, and hence the name of the Court. Out of deference to the English population, and to that portion of the law introduced into this country from England, the Court of appeals was styled "The Court of Queen's Bench," and to it was given original criminal jurisdiction. We can, therefore, no more examine what the Superior Court does within its civil attributions, unless it be on writ of appeal, than they can examine into what we do. What should we say if we committed a person of this side, and the Superior Court, or a single judge, on *habeas corpus*, delivered him? And what would be the astonishment of the Superior Court if, carrying on its proceedings by record, it found itself suddenly stopped by the fact that a judge of this Court had set a prisoner at large on the ground that the proceedings of the Superior Court were not as regular as they might be? It will be observed that the application here for a *habeas corpus* is not an appeal; it is precisely similar to the application to a single judge in Chambers *out of term.* It has been said, that there is no judgment to support the commitment. How do we know that? By what means can we procure the judgment of the Court below? If we sent a *certiorari* to the Prothonotary, except in appeal, it would be his duty to refuse to deliver up his record, and he would be properly punished by the Superior Court if he dispossessed himself of it. Were we to come to any other decision than this, the most extreme confusion would be the result, and the great judicial proceedings of the country would be considerably embarrassed. Nor can the petitioner suffer by this decision, for he is not deprived of his recourse to his regular judges, and from them to us by appeal if they do him wrong, 792, C. C. P. I have

only to add that doubtless there are cases where a prisoner might be released where it was clear that, although the proceedings purported to be in the Superior Court they were clearly *coram non judice;* but there is no pretence that such is the case here. We are therefore of opinion that the writ must be refused.

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Dorion C. J., differed, mainly on the ground, that here it appeared that the petitioner could not get his release without paying some $39 more than he owed. His honor was therefore of opinion that the writ should issue. The petitioner should not be detained in gaol under a warrant, which is not justified by the order of the Court.

As to the pretension that no writ of *habeas corpus* can issue because this is an arrest under a civil process, the same rule prevails in England (*Cobbett v Slowman* 4 Exchequer 747;) but there as here the civil process must issue from a competent authority and there are numerous instances wherein writs of *habeas corpus* have been issued to enquire into causes of imprisonment under civil processes, or wherein the right to do so has been recognised. *Cobbett, ex parte* 3 H & N 155 *Dodd's* case, 4 Jurist N. S. 291; *Dimes's* case, 14, Q. B. 554. *Dakins ex parte*, 16 C. B. 77. *Eggington ex parte*, 2 El. and Bl. 717. *Carus Wilson, in re*, 7 Q. B. 984. *John Crawford, in re*, 13 Q. B. 613. The majority of the Court, however, thought differently, and the Chief Justice added that he was glad the question, which had caused much difference of opinion, was going to be settled once for all.

Requête rejetée.

J. Pallisser, avocat du requérant.

DeBellefeuille & Bonin, avocats des demandeurs.

MONTREAL, 23RD SEPT. 1881.

Presents :

Chief Justice DORION, RAMSAY, TESSIER, CROSS and BABY, J. J.

No. 417.

THE QUEEN,

AND

FRANÇOIS JAMES MALOUIN DIT RINFRET.

Forgery.—Reserved case.

Held :—that the judge of sessions, when sitting under the speedy trials act. 32 and 33, c. 35, cannot reserve a question arising at a trial had before him without a jury, and that the Court of Queen's Bench had no authority to decide a question so reserved.

RESERVED CASE.

The defendant was indicted under *section* 26*th* of *chap.* 29, 32 *and* 33 *Vic.*, for having feloniously forged a certain acquittance and receipt for money with intent thereby to defraud.

The accused made his option to be tried under the *speedy trials act* (*chap.* 35, 32 *and* 33 *Vic.*), before a *judge* without a *jury.*

Upon his being arraigned on the 37*th july* 1881, he pleaded *guilty.* Having a doubt as to the jurisdiction of the *Court of General Sessions* in cases of *forgery*, as well under statutory dispositions as under the *common law*, I deferred *sentence* in order to reserve the point for the consideration of the *Court of Queen's Bench*, sitting in appeal and error, and this I now respectfully beg to submit.

Montreal, 16*th september* 1881.

(Signed), C. AIMÉ DUGAS,
Judge of the Sessions of the Peace.

RAMSAY J., said in substance :—This is a case submitted by the Judge of Sessions and reserved by him while holding the Court under the Speedy trials Act. The defendant being accused of forgery made his option to be tried before the Judge of Sessions without a jury and pleaded guilty to the charge. The question reserved is whether the Judge of Sessions had jurisdiction under the act to try cases of forgery.

As we intimated at the argument, there is a preliminary

question to be determined and that is whether or not the Judge of Sessions can reserve a question for the decision of this Court and we have come to the conclusion that he cannot do it.

The Queen & François James Malouin dit dit Rinfret.

The authority of this Court to decide questions reserved at the trial of criminal offences is derived from the Consolidated statutes ch. 77, sect. 57, which is in the terms following :

57. " When any person has been convicted of any treason, " felony or misdemeanor, at any criminal term of the said " Court of Queen's Bench, or before any Court of Oyer and " Terminer, gaol delivery or *quarter sessions*, the Court " before which the case has been tried, may in its discre- " tion, reserve any question of law which has arisen on the " trial, for the consideration of the said Court of Queen's " Bench on the appeal side thereof, &c... "

By sect. 58 the mode of submitting such questions is indicated and by sub-section 2 of the same section, it is provided that the said Court of Queen's Bench shall have full power and authority to have and determine the questions so reserved.

By the Speedy trials Act judges of sessions in the Province of Quebec are authorised to try under this act, *out of sessions*, any person committed to a jail on a charge of an offence for which he may be tried at a court of general sessions of the Peace. When the person so charged does consent to such trial.

This provision does constitute the court so held into a court of *quarter sessions* and therefore gives the judge of sessions no authority to reserve a question of law arising at the trial had before him.

If there could have been any doubt upon this question, it would have been removed by the fact that the speedy trials act was amended by the act 38 Vict., ch. 42, s. 1 expressly for the purpose of authorising the county judges in Ontario, while trying cases under this act, to reserve questions for the consideration of the Justices of the Superior Courts of Common Law, in the same manner and to the same extent, as may be done by the Court of general sessions of the Peace. There is no such provision as regards the Province of Quebec,

Having no jurisdiction in this matter, we do not think it advisible to express any opinion on the question submitted.

J. A. Ouimet, *Q. C.*, for the Crown.

Defendant not represented.

MONTRÉAL, 20 JUIN 1881.

Coram : DORION, Juge en chef, MONK, RAMSAY, CROSS et BABY, J.J.

No. 105.

ANDRÉ ROBERT,

Demandeur en Cour inférieure,

APPELANT ;

ET

LA CITÉ DE MONTRÉAL,

Défenderesse en Cour inférieure,

INTIMÉE.

L'appelant et trois autres propriétaires, dont il est le cessionnaire, ont vendu à l'intimée, pour la construction de l'aqueduc, des terrains en se réservant le droit d'enlever les clôtures qui étaient sur les terrains vendus. Ces clôtures ont été enlevées en 1874 et 1875 par un nommé Donnelly qui avait entrepris de faire, à forfaix, la partie de l'aqueduc où ces clôtures se trouvaient, ainsi que par d'autres personnes. En 1879, l'appelant a porté cette action pour la valeur des clôtures enlevées par Donnelly et autres.

JUGÉ.—1o. Que la prescription de deux ans établie par l'art, 2261, C. C. pour dommages résultant de délits et de quasi-délits ne s'applique pas à l'espèce actuelle.

2o. Que l'intimée n'est pas responsable des actes de Donnelly qui n'était pas son préposé, mais un entrepreneur ordinaire et à forfaix des travaux de l'aqueduc.

L'appelant et trois autres propriétaires de Lachine ont vendu à l'intimée le terrain nécessaire pour faire passer sur leur propriété l'aqueduc de Montréal et se sont réservé le droit d'enlever leurs clôtures qui étaient sur le terrain vendu.

La corporation de la cité a donné, à forfaix, à un nommé John Donnelly, la construction du canal y compris la confection de clôtures pour séparer les terrains achetés pour le canal de ceux restant aux vendeurs.

Dans l'automne de 1874, Donnelly fit défaire les clôtures qui nuisaient aux travaux du canal et le bois fut mis en piles sur les lieux mêmes. Pendant qu'une partie de ce bois était

enlevée par diverses personnes qui n'y avaient aucun droit, une partie fut employée par Donnelly pour faire des clôtures temporaires.

Ce n'est qu'en 1879 que l'appelant, tant en son propre nom que comme cessionnaire de trois de ses voisins, a intenté cette action par laquelle il réclame $284.90 de dommages causés par l'enlèvement du bois des clôtures qui étaient sur les terrains qu'ils ont vendus à l'intimée.

La Cour de première instance a renvoyé l'action parce que l'appelant qui demandait la réparation d'un quasi délit aurait dû, d'après l'art. 2261 C. C., porter son action dans les deux ans après les voies de fait dont il se plaignait.

Dorion, juge en chef: — La majorité de la Cour est d'opinion de confirmer ce jugement, mais non pas pour le motif donné par la Cour de première instance.

L'appelant n'a pas porté son action pour être indemnisé de dommages que lui aurai causés l'intimée par un délit ou un quasi-délit, mais pour être payé de la valeur des clôtures qui lui appartenaient ainsi qu'à ceux dont il est le cessionnaire. L'appelant dit à l'intimée — vous avez profité des clôtures qui m'appartenaient, payez-m'en la valeur — et cette action ne se prescrit pas par deux ans.

En France l'action civile résultant d'un délit se prescrit par le même laps de temps que l'action publique ; et cependant, voici ce que disent à ce sujet Aubry & Rau, T. 4, p. 752 :

" Du reste la règle, d'après laquelle l'action civile se prescrit par le même laps de temps que l'action publique, (en France l'action publique se prescrit par dix ans lorsqu'il s'agit d'un crime, et trois ans s'il s'agit d'un simple délit,) ne s'applique qu'à l'action civile proprement dite, c'est-à-dire à l'action qui, exclusivement fondée sur le droit de demander la réparation d'un dommage causé par un crime, par un délit, ou par une contravention, a pour objet unique la réparation de ce dommage. Elle est étrangère aux actions en restitution, en répétition, ou même en dommages-intérêts dérivant d'un droit préexistant au délit, et indépendant de l'obligation de réparation auquel le délit a pu donner naissance. Ces actions ne s'éteignent que par la prescription du droit civil. "......

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" ......Enfin, on doit également décider que l'action du pro- " priétaire en restitution d'une chose qui lui aurait été sous- " traite, ne se prescrit que par trente ans à l'égard de l'auteur " de la soustraction, encore que cette dernière présente tous " les caractères d'un vol. "

Larombière, sur les articles 1382 et 1383, Code Civil, No. 49, dit également :

" Cependant, dans les cas où le fait qui donne lieu à l'ac- " tion en dommages et intérêts est incriminé par la loi pénale, " comme constituant un crime, un délit ou une contraven- " tion, cette action n'est pas toujours indistinctement soumise " à la même prescription que l'action publique. Elle ne sera " elle-même éteinte que par la prescription ordinaire, lorsque, " indépendamment du fait sur lequel se fonde son exercice, " elle a sa cause dans un droit antérieur et préexistant au " délit, appartenant à la partie lésée."

L'auteur donne des exemples qui font toucher du doigt la différence qu'il établit :

" Ainsi (dit-il, *loc. cit.*), vous commettez à mon préjudice la " soustraction d'un billet à ordre ou d'une lettre de change, " et vous en touchez le montant en vertu de mon endos en " blanc, qui vous présente aux tiers comme étant mon man- " dataire. Bien que plus de trois ans se soient écoulés depuis " le délit, et que l'action publique se trouve prescrite ; bien " que sur ma plainte il soit intervenu une ordonnance de " non lieu, je pourrai encore agir devant les tribunaux civils " à fin de restitution des sommes détournées, soustraites ou " dissipées. Mon action en effet naît, d'un fait purement civil, " distinct du délit, quoiqu'il ait une origine commune," mais sans se rattacher cependant aux mêmes causes (Cass. 16 avril 1845 ; Sirey, 45, 1, 494.)

Ib. No. 51.—" Quant aux délits de toute autre nature qui, " faisant le sujet d'une incrimination pénale, sont commis " contre les biens, tels que destructions, dégradations, dom- " mages, entraves à la liberté des enchères, lesquels ne sont " que de simples attentats non permanents à la propriété, " sans constituer aucun acte de contravention ou d'inexécu- " tion d'un engagement antérieur, et sans donner lieu non " plus, de la part du propriétaire lésé, à aucune action *en re-* " *vendication ou en répétition*, l'action civile qui en résulte,

" n'ayant d'autre cause que le fait même constitutif du délit, " s'éteint par la même prescription que l'action publique."

Ces autorités sont applicables à l'espèce actuelle et surtout aux règles consacrées par notre Code Civil en matière de prescription.

D'après l'art. 2198, C. C., " le *voleur* et ses héritiers et suc-" cesseurs à titre universel ne peuvent par aucun temps pres-" crire la chose volée..." Voir aussi l'art. 2218, C. C.

Or n'y aurait-il pas une contradiction choquante à dire,—vous pouvez en tout temps, même après trente et quarante ans, réclamer votre chose du voleur qui s'en est emparée, mais s'il l'a vendue à un acquéreur de bonne foi, vous n'aurez que deux ans pour réclamer le prix que le voleur en aura reçu ?

Celui qui a indûment reçu ce qui ne lui était pas dû est obligé de le restituer et s'il ne peut le faire en nature, il est tenu d'en payer la valeur (art. 1047, C.C.) S'il est de mauvaise foi, il est tenu de restituer la chose reçue avec les profits qu'elle aurait produits (art. 1049, C. C.) et si la chose ne peut plus être restituée en nature, celui qui l'aura reçue de mauvaise foi est obligé d'en restituer la valeur et s'il l'a vendue de bonne foi, il ne devra restituer que le prix qu'il en aura reçu (art. 1851, C. C.)

Dans tous ces cas, qu'il y ait délit comme dans le cas où quelqu'un reçoit de mauvaise foi une chose qu'il sait ne pas lui être due ou qu'il n'y ait qu'un quasi-contrat, comme lorsqu'il la reçoit de bonne foi, l'action, pour se la faire restituer ou en recouvrer le prix ou la valeur, ne se prescrit que par dix ans (art. 2258, C. C.)

Le prix d'un meuble vendu ne se prescrit que par cinq ans (art. 2260, C. C.)

Si le voleur pouvait prescrire par deux ans l'action en restitution du prix ou de la valeur de la chose volée, il aurait un privilège que le Code refuse à celui qui aurait commis un délit bien moins grave en recevant cette chose de mauvaise foi, ou même à ceux qui, comme un acheteur ou celui qui de bonne foi aurait reçu ce qui ne lui était pas dû, n'auraient commis aucun délit.

Il faut donc dire que l'art. 2261 ne s'applique pas à cette cause et que chaque fois qu'une partie réclame le prix ou la valeur de sa chose, soit directement ou à titre de dommages

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ou d'indemnité de celui qui sans droit et même en commettant un délit en aura obtenu la possession, on ne pourra lui opposer la prescription de deux ans établie par cet article. Mais l'appelant a-t-il prouvé sa demande? Je suis d'opinion que non.

La preuve fait voir que lorsque Donnelly a commencé ses travaux, dans l'automne de 1873, il a fait replacer les clôtures et qu'il en a mis les matériaux en piles où ils sont demeurés, du moins en partie, jusqu'au printemps de 1874.

L'appelant et ses cédants devaient enlever ces clôtures, pourquoi ne l'ont-ils pas fait avant que les travaux ne fussent commencés ou du moins lorsque les matériaux étaient en piles sur leurs propriétés? C'est ce qui n'est pas expliqué.

Elie Robidoux, témoin de l'appelant, dit: "Elles (les clô-"tures) ont été brûlées, tout ou chacun qui restait à l'entour "de la terre en a pris pour brûler, moi-même j'ai pris de ces "perches pour faire de la clôture chez Madame Dunberry."

Madame Dunberry est représentée en cette cause par l'appelant, son cessionnaire. Il est impossible, d'après la preuve, de dire ce qu'est devenu de ce bois; mais il est certain que puisque, d'après un des témoins de l'appelant—tous les voisins en prenaient,—l'appelant lui-même et ses cédants auraient pu facilement enlever cette clôture qu'ils s'étaient réservée par leur acte de vente, et s'ils perdent quelque chose, c'est dû à leur propre négligence.

Dans tous les cas s'ils ont quelque recours, ce ne peut être que contre Donnelly l'entrepreneur des travaux et non contre l'intimée qui n'est pas responsable de ses actes.

Donnelly n'était pas son employé ni sous son contrôle (art. 1054, C. C.; Haroldc La Corporation de Montréal. 3 L. C. J. 88).

Sourdat, T. 2, No. 892, dit à l'égard de la responsabilité du maître ou commettant:

"Le dommage causé par l'entrepreneur lui-même ou par "ses ouvriers. n'engage pas la responsabilité de celui qui a "traité à forfaix, de l'exécution des ouvrages, par exemple "l'Etat, une compagnie de chemins de fer, ou de canaux. "Entr'eux et l'entrepreneur, il n'y a qu'un contrat de louage "d'ouvrages, qui ne soumet pas lui-même les contractants à "aucune responsabilité civile vis-à-vis des tiers."

Un arrêt du 20 août 1847 (Sirey 1847, 2, 283) en donne la raison :

" Attendu (est-il dit dans cet arrêt) que la responsabilité à " laquelle cet article soumet les commettants, ne dépend pas " seulement de ce qu'ils ont choisi leurs préposés, mais sup- " pose, en outre, qu'ils ont le droit de leur donner des ordres " et des instructions sur la manière de remplir les fonctions " auxquelles ils les emploient, autorités sans laquelle il n'y a " pas de véritables commettants."

L'on a voulu prétendre que Lesage et McConnell, deux des employés de l'intimée, s'étaient obligés de la part de l'intimée envers l'appelant de lui payer ses dommages. Mais lors même que les employés de la Corporation auraient pu engager la Corporation sans y être autorisé par le Conseil, il n'y a aucune preuve qu'ils l'aient fait.

RAMSAY, J. (*diss.*) I do not think the prescription of Art.2261 C. C. applies to a case like the present. There is no question of a *quasi-délit* either. There was an error as to rights under a contract, and without any idea of wrong doing, the contractor made use of the fencing which he had properly removed.

There is some difficulty as to the classification adopted by the C. C. 983, notwithstanding its symmetrical form (Ortolan III, Nos. 1198 and 1621). Since, then, Art. 2261, C. C. compels one to attribute the obligation to its origin, it seems to me it takes its rise in what resembles a contract, rather than in what resembles an offence—let us translate it trespass. This helps us to settle another point in this case, namely the pretension that the contractor and not the Corporation is liable.

It seems to me Donnelly only acted, and indeed he could only act for the Corporation. What he did was under a misapprehension of the rights of the Corporation, therefore it is impossible to say that the Corporation can send the plaintiff to his recourse against Donnelly. They had full notice of the claim, and they should have settled the matter with Donnelly. Again, I do not think the Corporation can ignore the acts of their agents Lesage and McConnell. They were evidently performing duties which a corporation can only perform by an agent, and their acts within the scope of these

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duties necessarily bind the Corporation whether ratified or not.

As to the facts, there can be no difficulty; the use made of some of the fencing is distinctly traced, and although Robidoux says some of it was carried away and burned by himself and others, Lesage tells of that it appeared to be in the possession of Donnelly. I am, therefore, of opinion to reverse.

Jugement confirmé.

BABY, J., also dissented, and concurred in the reasons stated by Mr. Justiie Ramsay.

Girouard & Würtele, pour l'appelant.
Roüer Roy, C. R., pour l'intimée.

QUEBEC, 8 SEPTEMBRE 1881.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. .

PRINCE,

Défenderesse en Cour Inférieure,
APPELANTE ;

ET

GAGNON,

Demandeur en Cour Inférieure,
INTIMÉ.

En octobre 1871, Louis Ludger Richard s'est marié à Marie Célanire Gagnon, et par leur contrat de mariage Louis Richard, père, a donné à son fils deux propriétés en avancement d'hoirie. Dans le même temps il s'est retiré du commerce et a laissé à son fils tout son fonds de commerce, après en avoir fait inventaire, et une estimation à l'amiable, qui en a porté la valeur à $5466. Il n'y a aucun écrit pour constater si c'est à titre de vente ou de donation que ces marchandises ont été laissées au fils. Ce dernier est décédé en 1872, laissant une fille, et Louis Richard, père, a été nommé son tuteur. Il est lui-même décédé depuis et l'action est portée en reddition de compte de tutelle par la tutrice de la mineure contre l'appelante, légataire universelle de Louis Richard.

Dans son compte l'appelante a chargé en dépense cette somme de $5466 que Louis Richard a portée dans l'inventaire, qu'en sa qualité de tuteur il a fait des biens de la succession, comme lui étant due par son fils.

Jugé : En infirmant le jugement rendu par la Cour de première instance, que Louis Richard, père, n'avait pas donné, mais vendu son fonds de commerce à son fils, et que l'appelante avait le droit de charger en dépense cette somme de $5466.

Quelques jours avant sa mort, Louis Ludger Richard a donné un billet de $600 à Louis Richard, son père. Ce billet a été escompté et après la mort de son fils, Louis Richard, père, l'a payé. L'appelante a chargé en dépense le montant de ce billet, comme étant dû par la mineure à la succession de Louis Richard, père.

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La Cour de première instance a décidé que ce billet était un billet de complaisance donné par le fils à son père, sans cause, et qu'il devait être retranché du chapitre de dépenses.

Jugé : 1o. Que Louis Richard, père, n'ayant pas mentionné dans l'inventaire qu'il a fait en sa qualité de tuteur des biens de la succession de son fils, que ce billet lui était dû, l'appelante était, en vertu de l'article 292 C. C., déchue du droit d'en répéter le montant, et que la Cour avait avec raison retranché cet item du compte de l'appelante en infirmant le jugement de la Cour de première instance.

2o. Que l'appelante a établi par une preuve suffisante qu'elle avait fait double emploi en donnant deux fois crédit, sous différents titres, des sommes de $451.07 et de $190.76 et que ces sommes n'auraient pas dû être retranchées du chapitre de dépenses.

DORION, J. C.—Louis Ludger Richard, décédé en juillet 1872, a laissé une enfant mineure, Marie Louise Célanire Richard, issue de son mariage avec Marie Célanire Gagnon.

Dès le décès de Louis Ludger Richard, son père, Louis Richard, a pris l'administration des biens de sa succession et, le 23 octobre 1872, il a été nommé tuteur à la mineure, sa petite fille, dont il a administré les biens jusqu'à son décès arrivé le 13 novembre 1876.

Marie Célanire Gagnon a alors été nommée tutrice à sa fille Marie Louise Célanire Richard, et elle a, en sa qualité de tutrice, porté cette action contre l'appelante, veuve de feu Louis Richard et sa légataire universelle, pour lui faire rendre compte de l'administration que ce dernier a eue des biens de Marie Louise Célanire Richard. Plus tard la tutrice s'est mariée et l'intimé, son père, aïeul de la mineure, a été nommé tuteur et a repris l'instance.

L'appelante a d'abord prétendu avoir rendu compte, mais elle a été finalement condamnée à rendre compte et elle s'est conformée au jugement de la Cour de première instance.

Par le compte qu'elle a rendu, elle établissait une balance en sa faveur de la somme de $91.56.

Ce compte a été débattu par la tutrice qui a allégué, que l'appelante avait omis de porter en recette diverses sommes au montant de $105.30, ce qui a été admis par l'appelante.

Cette correction faite laisse une balance de $13.74 due par l'appelante au lieu de celle de $91.56 qu'elle réclamait comme lui étant due.

L'appelante a porté en dépense une somme de $600 montant d'un billet promissoire fait par Louis Ludger Richard, à l'ordre de son père Louis Richard et que ce dernier avait escompté à la Banque Nationale, mais qu'il a été obligé de payer après la mort de son fils.

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La tutrice a contesté cet item en alléguant que ce billet était un billet de complaisance (accommodation) que Louis Ludger Richard avait donné à son père, sans en recevoir aucune valeur.

Outre les présomptions résultant de la preuve, qu'en effet, ce billet a pu être donné sans cause, ce qui, cependant, n'est pas prouvé d'une manière concluante, il est un fait qui doit priver l'appelante du droit de réclamer cette somme de $600, c'est que lorsque le tuteur Louis Richard a fait, en novembre 1872, l'inventaire, qu'il était obligé de faire des biens de sa pupille, il n'a fait aucune mention de cette créance de $600, quoiqu'il eût retiré ce billet de la banque depuis le mois d'octobre précédent et qu'il en fût alors le porteur. Or l'article 292 du Code civil est formel et dit, que s'il est dû quelque chose au tuteur par le mineur, le tuteur doit le déclarer dans l'inventaire, à peine de déchéance. L'appelante a voulu prétendre que le tuteur avait payé ce billet, ainsi que plusieurs autres dettes, à même les deniers de sa pupille et qu'il n'y avait pas de raison de les mentionner dans l'inventaire.

Mais il faut remarquer que lorsque M. Richard a payé ce billet, il n'était pas encore nommé tuteur et qu'il n'avait aucun droit de prendre les deniers de la mineure pour payer un billet fait à son ordre et dont il était responsable vis-à-vis du porteur, et que de plus, M. Richard, qui s'était immiscé dans la gestion des biens de son fils avant d'avoir été nommé tuteur, devait constater par l'inventaire l'état de la succession lorsque sa gestion a commencé et non lorsqu'il a fait l'inventaire, et qu'il aurait dû y porter le billet comme lui étant dû, ou comme étant dû à la Banque Nationale lors du décès de son fils, avec mention qu'il avait depuis payé ce billet, pour pouvoir en réclamer le montant de la succession.

Cet item de $600 a été avec raison retranché du chapitre de dépense.

La Cour de première instance a également retranché deux petits items, l'un de $5.95, qu'elle a déduit du montant réclamé pour le coût du compte, et une somme de $20 pour le coût d'une seconde copie de l'inventaire que l'appelante a produite avec son compte, lorsqu'elle avait déjà produit une autre copie de ce même inventaire avec un premier compte. Cette première copie d'inventaire était, paraît-il, adhirée lorsque l'appelante a produit le dernier compte. Il est possible que,

sous les circonstances, l'appelante fût justifiable à se procurer une seconde copie de l'inventaire aux dépens de la mineure, cependant comme ces deux items sont peu importants et qu'ils ne se rapportent qu'à une taxe de frais concernant la reddition, nous ne croyons pas devoir intervenir avec la décision de la Cour quant à ces deux items se montant à $25.95.

Cette somme de $25.95 ajoutée à celle de $600 et à la balance de $13.74 porte le reliquat dû par l'appelante à une somme de $639.69.

L'appelante a de plus chargé en dépense une somme de $5466.63 pour le prix et valeur de marchandises vendues et livrées par M. Louis Richard à son fils, dans l'automne de 1871.

La tutrice a contesté cet item, en alléguant, que ces marchandises n'avaient pas été vendues, mais qu'elles avaient été données par M. Richard, père, à son fils.

Il n'y a aucun écrit pour constater si c'est à titre de vente ou de donation que ces marchandises ont été laissées par le père à son fils, ni aucun témoin qui puisse rapporter qu'elles ont été les conventions qui ont pu avoir lieu entre le père et le fils au sujet de ces marchandises, et comme tous deux sont décédés, c'est d'après les circonstances qu'il faut juger, si c'est une donation ou une vente que M. Richard, père, a faite à son fils.

En octobre 1871, Louis Ludger Richard, qui avait été jusqu'alors commis chez son père, s'est marié avec la demanderesse Marie Célanire Gagnon. M. Richard s'est à cette occasion retiré des affaires et a laissé tout son fonds de commerce évalué d'après l'inventaire, qui en a alors été fait, à une somme de $5466.63. Cet inventaire a été terminé le jour même ou la veille du jour que le contrat de mariage de Louis Ludger Richard a été passé.

Par ce contrat de mariage, M. Richard, père, a donné à son fils, *en avancement d'hoirie*, une maison pour y faire sa résidence et le magasin, c'est-à-dire la bâtisse où il fesait son commerce à Stanfold, depuis un grand nombre d'années. Il n'est fait dans ce contrat de mariage aucune mention du fonds de commerce de M. Richard, et le fait que le jour même où il lasssait ce fonds de commerce à son fils, il lui fesait une donation de deux immeubles,crée une forte présomption qu'il n'entendait pas lui faire une donation de ce fonds de com-

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merce, autrement il l'aurait donné par le contrat de mariage en même temps qu'il lui donnait les deux immeubles qui y sont mentionnés.

Cette présomption est fortifiée par le témoignage d'Octave Ouellette, qui a été employé par M. Richard, père, pour faire l'inventaire des marchandises qu'il a cédées à son fils. Cet inventaire comprenait, non seulement les marchandises qu'il avait à Stanfold, mais encore d'autres marchandises venant d'un magasin qu'il avait à Somerset. Ce témoin,après avoir dit qu'il avait fait l'inventaire contenu dans le livre Exhibit H de l'appelante, à la demande de M. Richard, père, qui abandonnait les affaires à son fils Ludger, ajoute : " M. Richard laissait avoir son fonds de magasin à raison de seize chelins et " trois deniers dans le louis, à part certaines marchandises " provenant du magasin que M. Richard avait à Somerset en " société avec I. A. Gaudette, que Ludger Richard avait choisies et qu'il payait le plein montant."

En transquestions, ce témoin dit : " Je n'ai pas connaissance " de la vente du stock, mais j'ai eu connaissance de l'inventaire ; il y avait quelques marchandises que Ludger Richard " voulait faire réduire comme ayant peu de valeur. M. Louis " Richard a fait remarquer qu'elles avaient déjà été réduites."

Et avant cela le témoin avait dit : " Pendant que nous étions " à faire l'inventaire, lorsqu'il se faisait des ventes du *stock* " non encore inventorié, l'argent était pour M. Louis Richard, " et quand il se faisait des ventes du stock inventorié, c'était " pour Ludger."

Si c'était une donation que M. Richard faisait à son fils de tout son fonds de commerce et même de marchandises provenant du magasin de Somerset, pourquoi celui-ci discutait-il les prix auxquels on les portait dans l'inventaire et demandait-il à ce que ces prix fussent réduits ? Pourquoi distinguer, pendant qu'on fesait l'inventaire, entre les marchandises inventoriées que l'on vendait et dont le prix appartenait au fils, de celles non inventoriées dont le prix était pour M. Richard, père. Si M. Richard avait donné à son fils son fonds de commerce dont la valeur excédait $5,000, est-il à supposer qu'il aurait hésité à lui donner les quelques piastres reçues pour marchandises non inventoriées que l'on vendait au magasin pendant que l'on faisait l'inventaire.

Mde. Gagnon, (Hermine Girouard, mère de madame Louis

Ludger Richard, qui l'a fait entendre comme son témoin), explique comme suit ce qui a été dit par M. Louis Richard avant de signer le contrat de mariage de son fils :

Question.—" Lorsque Louis Ludger Richard s'est marié avec votre fille la demanderesse, où s'est passé le contrat de mariage ? "

Réponse.—" Chez nous, dans le village d'Arthabaskaville."

Question.—" Veuillez dire si dans cette circonstance, l'honorable Louis Richard, époux de la défenderesse, qui est maintenant décédé, était présent et s'il a été question du stock ou fonds de magasin que M. Louis Richard avait eu auparavant à Stanfold ?

Objecté à cette question par la défenderesse rendant compte comme illégale, en autant 1o. *qu'elle tend à prouver par témoins, une donation d'une valeur de plus de* $50, *et* 2o. *en autant qu'elle tend à prouver outre le contenu d'un acte authentique.*

Réservée par le juge au mérite.

Réponse.—" Oui, il en a été question, M. Richard était présent. Il a été question de donner à Ludger la bâtisse du magasin et un autre emplacement voisin pour avantager sa femme, lui donner un douaire, et qu'il lui donnait le stock en acompte sur ce qu'il était pour lui donner plus tard, quand il ferait le partage de ses biens. M. Richard a dit qu'il avait fait inventaire dans la semaine ou la semaine d'avant pour avoir une idée du montant qu'il donnait à son fils."

TRANSQUESTIONNÉE SOUS RÉSERVE.

" La conversation que j'ai rapportée ci-dessus a eu lieu lorsque les arrangements de famille ont été faits la veille du mariage. M. Richard a déclaré qu'il donnait à son fils Ludger, la bâtisse du magasin et le stock, mais *qu'il ne mettait pas le stock dans le contrat de mariage, parce qu'il pouvait lui survenir des revers de fortune et qu'il pourrait peut-être trop lui en donner, pour ce qu'il pourrait donner aux autres*, qu'il lui donnait ça en acompte. Mon mari a dit la même chose : " Je ne puis rien donner aujourd'hui à ma fille, parce que je peux administrer mes biens à présent mieux qu'elle," mais M. Richard a dit qu'il était obligé de donner quelque chose à son fils et qu'il lui donnait le stock qui valait environ $5,000 pour le faire partir, mais qu'il ne mettait pas ça sur le contrat de mariage, pour la raison qu'il n'avait rien donné à madame Bour-

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beau qui était mariée, excepté certaines petites choses, et qu'il espérait, si ses affaires allaient bien, pouvoir donner plus que $5,000 à Ludger, et en outre parce qu'il ne voulait pas faire le partage de ses biens à ses enfants. Mais il donnait la bâtisse à Ludger de plus qu'à ses autres enfants, parce qu'il avait été son bras droit et qu'il lui avait aidé à faire sa fortune."

Ce témoignage est important et il explique pourquoi M. Richard qui, pour favoriser son fils, se retirait des affaires en lui laissant son établissement, n'entendait pas lui donner alors son fonds de commerce pour la raison qu'il pourrait lui survenir des revers de fortune et qu'il pourrait peut-être, en le fesant, lui donner plus qu'il ne pourrait laisser à ses autres enfants... et parce qu'il ne voulait pas alors faire le partage de ses biens à ses enfants.

Ce témoignage est corroboré par M. Bourbeau, gendre de M. Richard et qui était avec lui chez M. Gagnon, lorsque le contrat de mariage a été passé.

D'un autre côté il est prouvé que M. Richard n'a porté dans ses livres le prix de ces marchandises au débit de son fils, qu'après le décès de ce dernier. Il a également mentionné cette dette parmi les dettes passives portées dans l'inventaire qu'il a fait de la succession de son fils. Et un grand nombre de témoins disent que M. Richard leur a dit qu'il avait donné son magasin à son fils, et qu'ils ont compris que c'était une donation qu'il lui en avait faite.

Nous n'attachons pas une grande importance à ces déclarations vagues rapportées par les témoins qui ne les ont pas tous comprises dans le même sens et qui, en effet, sont susceptibles de différentes interprétations.

Après avoir pesé toutes les circonstances, nous croyons que l'on doit attacher un grand poids au témoignage de madame Gagnon, non seulement parce qu'il est plus précis que celui des autres témoins, mais encore parce qu'étant en quelque sorte intéresssée,puisqu'il s'agissait du mariage de sa fille, elle a dû porter plus d'attention à ce que M. Richard lui a déclaré relativement aux avantages qu'il entendait faire à son fils.

En interprétant ce témoignage comme il nous paraît devoir l'être et en le prenant dans son ensemble, nous arrivons à la conclusion que M. Richard lui aurait dit, qu'il donnait la bâtisse du magasin à son fils de plus qu'à ses autres enfants et c'est pour cela qu'il l'a mentionnée dans le contrat de mariage,

qu'il lui laissait aussi son fonds de commerce, mais qu'il ne voulait pas le lui donner alors et le mentionner dans le contrat de mariage, parce qu'il pourrait par là lui donner plus qu'à ses autres enfants et qu'il n'était pas prêt à faire le partage de ses biens entre ses enfants, qu'il voulait avantager également, sauf la bâtisse du magasin qu'il donnait en plus à son fils.

Ce témoignage de madame Gagnon corrobore celui de Ouellette et explique pourquoi M. Richard a fait faire un inventaire et aussi pourquoi Richard, fils, tenu au paiement des marchandises, cherchait à en faire diminuer le prix, et aussi, pourquoi pendant que l'on fesait l'inventaire le prix des marchandises que l'on vendait allait au fils ou au père, suivant qu'elles étaient inventoriées ou non.

Nous croyons que cette somme de $5,466.63 n'aurait pas dû être retranchée du chapitre des dépenses.

Il reste deux autres items, l'un de $451.07 et l'autre de $190.76, qui ont également été retranchés du chapitre des dépenses.

Or l'appelante a fait la meilleure preuve possible sous les circonstances qu'elle avait porté en recette ces deux sommes comme argent reçu au comptoir et aussi comme dettes collectées.

Cette preuve consiste dans sa propre affirmation de son compte, dans l'affidavit de J. A. Hébert,qui était le commis de M. Richard et qui a reçu ces sommes et enfin dans le témoignage de J. E. Béliveau, qui dit qu'il a été commis chez M. Richard et que, pendant qu'il y était,l'on y comprenait sous le nom " d'argent au comptoir " l'argent des ventes au comptant et les collections.

Le double emploi fait par l'appelante provient de ce qu'elle s'est chargée en recette de l'argent reçu au comptoir et aussi des créances reçues d'après le ledger, lorsque les sommes reçues pour les créances étaient comprises dans l'argent au comptoir.

Hébert, qui aurait pu établir ce fait d'une manière précise, est mort et n'a pu être entendu comme témoin. Son affidavit seul ne ferait pas une preuve concluante. Mais nous croyons que c'est un cas où l'appelante sur une action en reddition de compte doit être crue à son serment, après avoir prouvé l'usage suivi par M. Richard et le décès de son principal témoin.

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Nous croyons donc que ces deux items de $451.07 et de $190.76 n'auraient pas dû être retranchés du chapitre des dépenses.

Le jugement de la Cour de première instance doit donc être réformé et le jugement de cette Cour est que l'appelante est condamnée à payer à l'intimé la somme de $639.69 au lieu de celle de $6,748.60, avec intérêt du jour de l'assignation et les dépens encourus en Cour de première instance; et l'intimé est condamné à payer à l'appelante les dépens sur l'appel.

Jugement réformé.

Laurier & Lavergne, pour l'appelante.
Felton & Blanchard, pour l'intimé.

QUEBEC, 8 MARCH 1881.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, J. J.

No.

JOHN ROSS & AL,

Plaintiffs in the Court below,

APPELLANTS.

&

THE MOLSONS' BANK,

Opponents in the Court below,

RESPONDENTS.

HELD.—1st. That banks cannot acquire a lien on logs under the banking act (34 V. c. 5, s. s. 46 and 47), if the pledge of these logs was made for a previous indebtedness, or if they were not held by virtue of a transfer of a receipt by a cove-keeper or by the keeper of any wharf, yard, harbour or other place, or of a specification of timber deposited in a cove, wharf, yard, harbour, warehouse, mill or other place in Canada within the meaning of the said act.

2nd. That to acquire a lien under articles 1745, 1966 and 1967, C. C., there must be an actual delivery or possession of the property pledged, or of some document in use in the ordinary course of business, entitling the bearer thereof, to claim possession of such property.

DORION, C. J.—The appellants have seized, in the river St. Maurice,as belonging to the defendant, the St. Maurice Lumber and Land Co., five thousand eight hundred and ninety-two pine logs.

The respondents filed an opposition *afin d'annuler*, by which they claim a lien on said logs by virtue of three several writings *sous seing privé*, which are produced. The first of

these writings is of the 17th of december 1875, and the St. Maurice Lumber and Land Co. thereby transfers to the respondents by way of pledge 19,861 logs lying in the River St. Maurice, to secure advances previously made to the amount of $72,500, by the second which bears date the 2nd of june 1876, the company acknowledges to be indebted to the respondents in a sum of $101,100 for advances previously made and in addition to the securities already held by the bank, the company pledges 12,000 logs lying in the river St. Maurice and its tributaries, and by the third writing which is of the 22nd of may 1877, the company acknowledges an indebtedness of $98,175 for previous advances, and transfers to the bank, as collateral security, 5226 logs lying in the St. Maurice and its tributaries.

In addition to these three writings the respondents have produced a considerable number of cullers' specifications of the inspection and receipt of the logs from persons who made the logs. These specifications do not show whether or not the logs were received by the company or by the bank, but it would appear by the testimony of Kiernan, the employee of the company, and by his subsequent correspondence with the bank, that they were received for the company, for in one of their letters, when the company had become insolvent, the bank enquires from Kiernan where are the logs on which they have obtained a lien.

This lien is claimed under the banking act 34 Vict. c. 5, s.s. 46 and 47, and also on the common law relating to pledges.

The Court below held that the bank was entitled to a lien on the logs seized and maintained its opposition.

We are of opinion that this judgment must be reversed.

The bank acquired no lien on these logs under the banking act, because each pledge was made for a previous indebtedness and also because the logs were not held by virtue of a transfer of receipts by a cove-keeper, or by the keeper of any wharf, yard, harbour or other place, or specification of timber deposited in a cove, wharf, yard, harbour, warehouse, mill or other place in Canada within the meaning of the said banking act. The bank never had the control of these logs which were brought down the St. Maurice by the men employed by the company and under their direction, although

it may be possible that these men were paid with the money of the bank. This, however, was done through the officers of the company.

The bank cannot claim a lien on these logs under the provisions of articles 1745, 1966 and 1967 of the civil code, for it never had the actual delivery or possession of these logs or of any document entitling it to claim possession of those logs, as required by said articles.

These questions of lien have already been raised in several cases and decided in the above sense. It is only necessary here to refer to the latest decisions. They are the cases of *Denholm* & *The Merchants' Bank*, decided on the 22nd of december 1877. *Robertson* & *al* & *Lajoie*, 22 L. C. J. 169. *Hearle* & *Rhind*, 22 L. C. J. 239. *Williamson* & *Rhind*, 22 L. C. J. 166, and in the more recent case of *Perkins* & *Ross* 6 Quebec Law Rep. 65.

Judgment reversed.

Messrs. MacDougall & MacDougall, for appellants.
Hon. Mr Irvine, Q. C., for respondents.

QUÉBEC, 7 DÉCEMBRE 1881.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS et BABY, J. J.

No. 69.

LA CORPORATION DE LA CITÉ DES TROIS-RIVIÈRES,

Demanderesse en Cour Inférieure,

APPELANTE ;

ET

F. X. MAJOR,

Défendeur en Cour Inférieure,

INTIMÉ.

JUGÉ, Dorion, J. C., et Cross, J., *dissentientibus*, que le règlement no. 13 passé par le conseil de ville de la cité des Trois-Rivières, dans les termes suivants : "*Il sera payé,*" *etc.*, n'est pas *ultra vires* et que le conseil de ville était autorisé à imposer la taxe qui y est mentionnée, en vertu de l'acte d'incorporation de la cité des Trois-Rivières (20 Vic. ch. 128, s. 36).

L'acte d'incorporation de la cité des Trois-Rivières (20 Vic. ch. 128, sect. 36), autorisait le conseil de ville à imposer certaines taxes annuelles sur *tous colporteurs et marchands ambulants venant vendre dans la cité des Trois-Rivières des articles de commerce de quelqu'espèce que ce puisse être.*

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Le conseil, s'autorisant de cette clause, a passé le réglement No. 13 qui est dans les termes suivants :

" *Il sera payé, comme susdit, au secrétaire-trésorier par toute*
" *personne étrangère et non résidente en la dite cité, qui viendra*
" *vendre ou offrir en vente en la dite cité des articles de commerce*
" *de quelque nature que ce soit, sur et représentés par des échan-*
" *tillons, cartes ou autres marques des dits articles de commerce*
" *et par toute personne qui fera la dite vente ou offre de vente*
" *d'articles sur échantillons pour et au compte d'aucun mar-*
" *chand, manufacturier, ou autre personne quelconque n'ayant*
" *pas sa principale place d'affaires dans la cité, une taxe ou coti-*
" *sation annuelle de dix piastres.*"

La corporation a fait saisir les effets de l'intimé pour le paiement de cette taxe de dix dollars, sous le prétexte qu'il avait vendu ou offert de vendre à plusieurs marchands des Trois-Rivières des marchandises, sur cartes ou échantillons.

L'intimé, en vertu de la clause 103 de l'acte 38 Vict. ch. 76, a fait une opposition à la saisie, alléguant, 1o. que cette saisie était nulle, parce qu'elle n'avait pas été faite avec les formalités requises par la loi ; 2o. que la corporation avait outrepassé ses pouvoirs en imposant cette taxe ; 3o. que la législature de la province avait empiété sur les droits du parlement de la Puissance en passant l'acte 38 Vict. ch. 76, qui a remplacé l'acte 20 Vict. ch. 128.

Cette opposition a été contestée et l'appelante a prouvé que le 30 août 1880, l'intimé avait offert en vente des marchandises sur échantillons pour la maison de commerce Stirling, McCall & Cie., mais qu'il n'en avait pas vendu.

Sur cette preuve la Cour Supérieure a maintenu l'opposition de l'intimé avec dépens, en déclarant, que le conseil n'avait pas le droit d'imposer la taxe pour laquelle les effets de l'intimé avaient été saisis.

DORION, J. C.—Je suis d'opinion de confirmer ce jugement. Le conseil était autorisé à imposer une taxe sur les COLPORTEURS ET MARCHANDS AMBULANTS qui viendraient vendre des articles de commerce dans la cité et il a imposé une taxe sur toutes personnes ne résidant pas dans la cité qui vendraient ou offriraient en vente des articles de commerce.

Une corporation municipale n'est autorisée à prélever des

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taxes, qu'en autant que ce pouvoir lui est expressément octroyé par sa charte, ou par son acte d'incorporation. 1 Dillon, On municipal corporations, § 295. Ibidem p. 173-4.

Une règle non moins certaine c'est que lorsque ce pouvoir est accordé à une corporation, elle ne peut l'exercer que dans les limites qui lui sont prescrites par sa charte, dont les termes doivent être suivis à la rigueur et ne reçoivent pas à cet égard une interprétation libérale.

" No ordinance or by-law of a corporation (dit Dillon, t. 1, " § 251) can enlarge, diminish or vary its powers. A similar " rule obtains in England."

Ib. p. 175. " *Courts adopt a strict rather than a liberal con-* " *struction of powers.* It is a well settled rule of grants by the " legislature to corporations whether public or private, that " only such powers and rights can be exercised under them " as are clearly comprehended within the words of the act, " or derived therefrom by necessary implication regard being " had to the objects of the grant, any ambiguity or doubt " arising out of the terms used by the legislature *must be* " *resolved in favor of the public.* This principle has been so " often applied in the construction of corporate powers, that " we need not stop to refer to authorities. Nelson J. in Min- " turn and Larue, 23 How. U. S. 435-6, 1839.

" Their authority (of towns) is delegated and their powers, " therefore, must be strictly pursued. Within the limits of " their charter, their acts are valid, without it they are void. " Willard & Killingworth." 8 Conn. 247, approved 10 Ib. 442 *Re* Fennell & the corp. of the town of Guelph, 24 Q. B. U. C. 238. McLean & the corp. of the town of St. Catherines. 27 Q. B. U. C. 603. Wilson & the corp. of the town of St. Catherines. 22 C. P. U. C. 462.

De plus lorsqu'une corporation est autorisée à imposer une taxe quelconque, elle doit le faire d'une manière juste, impartiale et raisonnable, et il ne lui est pas permis de la faire peser sur certaines personnes et d'en exonérer d'autres appartenant à la même classe, ni de faire de distinction entre celles qui sont domiciliées dans la municipalité et celles qui n'y résident pas. 1 Dillon, § 256. Angell & Ames, on corp., § 338. Chief Justice Shaw, in Spaulding & Lowell. 23 Pickering, 71-74, made the following observations :

" The legislature, if it does not make discriminations in

" violation of the state constitution, may authorize municipal " corporations to tax transient traders, or itinerant dealers " and peddlers ; and such tax is not in violation of the con- " stitution of the United States, although the property be " brought from another state, provided it does not unlawfully " discriminate in favor of the resident, and against the non " resident citizen."

En substituant les mots, " constitution of the Dominion of Canada" pour "constitution of the United States", cette décision est parfaitement applicable à la cause actuelle.

Maintenant il est évident que si une corporation ne peut exonérer de la taxe qu'elle impose quelques-uns de ceux, qui, d'après les termes de la loi doivent y être soumis, elle peut encore moins en charger ceux qui en sont exclus.

Ici le conseil était autorisé à imposer une taxe sur les *colporteurs et marchands ambulants venant vendre* des articles de commerce dans la cité et il a imposé une taxe sur *toutes personnes étrangères et non résidentes qui viendraient vendre ou offriraient de vendre* des articles de commerce dans la cité.

Comme toutes les personnes étrangères et non résidentes, qui vont vendre dans la cité des Trois-Rivières des articles de commerce, ne sont pas des colporteurs et des marchands ambulants, il s'en suit que le conseil a compris dans son règlement des classes nombreuses, comme les cultivateurs et autres, qui y vendent leurs produits et qui ne sont ni colporteurs, ni marchands ambulants, lorsqu'il ne pouvait taxer en vertu de l'autorité que l'appelante invoque, que ceux qui formaient partie de cette classe.

D'un autre côté le règlement n'impose une taxe que sur les personnes qui ne résident pas dans la cité. Le conseil n'avait pas plus le droit de faire une distinction entre les personnes qui résidaient dans la cité et celles qui n'y résidaient pas, qu'il aurait eu le droit de distinguer entre les personnes résidentes dans deux villes différentes, comme d'imposer une taxe sur les colporteurs et marchands ambulants domiciliés à Québec et d'exonérer ceux résidant à Montréal.

Les colporteurs et marchands ambulants sont désignés dans l'acte d'incorporation de la cité des Trois-Rivières, comme formant une classe particulière sur laquelle le conseil pouvait prélever une taxe spéciale, mais la législature n'a jamais autorisé le conseil à taxer ceux d'entr'eux qui ne résidaient

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pas dans la cité, sans en même temps taxer ceux qui y résidaient. Cette question du reste a été formellement décidée par la Cour Suprême dans la cause de Jonas & Gilbert (4 Legal News 93), dans laquelle il a été jugé, " that assuming the act " 33 Vict. c. 4, to be *intra vires* of the legislature of New " Brunswick, the by-law made under it was invalid, because " the act in question gave no power to the common council " of St. John, of discrimination between residents and non " residents, such as they had exercised in this by-law."

Il s'agissait, dans cette cause comme dans celle-ci, de la légalité d'une taxe imposée sur les commis-voyageurs.

Aux termes de la loi il n'y a que ceux qui viennent vendre c'est-à-dire, ceux qui vendent effectivement, qui peuvent être taxés et le règlement impose une taxe non seulement sur ceux qui vendent, mais encore sur ceux qui offrent en vente des articles de commerce, ce qui est bien différent. Ceux qui ont fait passer l'acte d'incorporation avaient peut-être l'intention d'autoriser le conseil à imposer une taxe sur ceux qui offraient en vente, comme sur ceux qui vendaient, mais alors, ils auraient dû le déclarer expressément, car lorsqu'il s'agit d'impôt, l'on ne peut étendre, d'un cas à un autre, le droit de les prélever.

Voici pour la validité du règlement.

Maintenant il est prouvé que l'intimé n'était qu'un simple commis-voyageur représentant une maison de commerce de Montréal. Il n'était ni colporteur, ni marchand ambulant, et le conseil ne pouvait, lors même qu'il l'aurait voulu, l'inclure dans la classe des colporteurs et des marchands ambulants sans changer la signification de ces mots.

" Huckster (dit le juge Ranney, dans Mayor & Cincinnati, " 1 Ohio St. 268-272), means a petty dealer or retailor of small " articles of provisions, &c., and an ordinance cannot enlarge " the ordinary meaning so as to embrace " any person not a " farmer or butcher who should sell or offer for sale any " commodity not of his own manufacture " and subject such " person to a penalty, it not being part of the franchise of " municipal corporations to change the meaning of English " words."

Dans cette espèce l'autorité municipale avait le pouvoir de faire des règlements concernant les regrattiers et il avait imposé une amende sur tous ceux qui, à l'exception des cultiva-

teurs et des bouchers, vendraient ou offriraient en vente, sans permission ou licence, des produits autres que ceux de leur propre manufacture, et ce règlement a été déclaré nul.

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Ici le conseil des Trois-Rivières, autorisé à prélever une taxe sur les colporteurs et marchands ambulants, en a imposé une sur toutes personnes étrangères et non résidentes qui vendraient des articles de commerce dans la cité. L'analogie entre les deux cas est frappante et je suis d'opinion que le règlement de la cité des Trois-Rivières devrait avoir le même sort que celui de la ville de Cincinnati.

L'intimé a prétendu que le règlement dont il est question affectait le commerce et que la législature provinciale n'avait pas pu autoriser le conseil de passer un règlement sur ce sujet, mais cette question ne se présente pas dans cette cause, parce que le règlement a été passé en vertu d'un acte passé par le parlement de la ci-devant province du Canada, avant l'acte de l'Amérique Britannique du Nord de 1867.

Je serais pour confirmer le jugement de la Cour Supérieure, mais étant avec M. le juge Cross dans la minorité, le jugement devra être infirmé.

Tessier. J.—La corporation de la cité des Trois-Rivières a passé le règlement dont il est question pour protéger les marchands et commerçants qui résident dans la cité et qui paient des taxes, contre la concurrence que les marchands qui n'y résident pas et qui ne paient aucune taxe à la corporation viennent leur faire en envoyant leurs commis voyageurs y faire des ventes à leur préjudice. Les marchands de la localité sont taxés soit sur les propriétés qu'ils occupent, sur leurs places d'affaires ou sur leur commerce. Il n'est que juste que ceux qui viennent d'ailleurs faire le même commerce qu'eux, supportent une partie des charges municipales. En obligeant les marchands étrangers à prendre une licence avant de pouvoir vendre leurs marchandises, on les force à payer à la corporation une taxe que les marchands résidents paient sous une autre forme. Il n'y a là ni irrégularité ni injustice, et nous croyons que d'après l'acte d'incorporation de la cité des Trois-Rivières, le conseil de ville était autorisé à passer le règlement dont il est question. Pour ces raisons, la majorité de la cour croit que le jugement doit être infirmé.

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Le jugement de la cour, infirmant celui de la cour de première instance, est comme suit :

Considering that the by-law imposing the tax in question is within the power conferred on the corporation appellant by law.

Considering that there is error in the judgment of the twenty-eighth day of june 1881, maintaining the opposition filed in this cause by the said Respondent: Doth reverse the said judgment; and proceeding to render the judgment which the Circuit Court at Three Rivers should have rendered, doth dismiss the said opposition with costs as well in the Court below as in this Court. And it is ordered that the record be remitted to the said Circuit Court, at Three Rivers.

Dissenting Mr chief Justice Dorion and Mr Justice Cross.

Jugement infirmé.

N. L. Denoncourt, pour l'appelante.

J. E. Méthot, pour l'intimé.

MONTREAL, 16 DÉCEMBRE 1881.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 142.

MOISE TERRIEN,

Défendeur en Cour inférieure,

APPELANT ;

ET

ABRAHAM LABONTÉ ET UXOR,

Demandeurs en Cour Inférieure,

INTIMÉS.

L'intimée, appelée à la substitution créée par le testament de son père, réclame, par action pétitoire, de l'apppelant un immeuble faisant partie des biens de la dite substitution. L'appelant, dans sa défense, allègue qu'il a acquis cet immeuble à une vente judiciaire, à la poursuite d'un créancier préférable à la substitution, laquelle se trouve en conséquence purgée par le décret. Réponse de l'intimée que cette créance n'était préférable à la substitution que par l'enregistrement tardif du testament créant la dite substitution, et que l'appelant ayant été son tuteur ne pouvait se prévaloir de ce défaut. Aucune allégation de la connaissance du testament par l'appelant n'est faite dans la dite réponse.

JUGÉ.—Que l'appelant ayant invoqué, à l'encontre de l'action pétitoire, un titre bon et valable à sa face, l'intimée était tenue d'en démontrer la nullité et, qu'en l'absence d'allégations et de preuve que l'appelant, tuteur de l'intimée, connaissait l'existence de ce testament, il est bien fondé à en invoquer l'enregistrement tardif.

Par son testament, en date du 5 octobre 1854, feu Jean-Baptiste Terrien, légua un certain immeuble à son fils Lucien

Terrien, pour par lui en prendre possession à compter de sa majorité, mais avec défense de vendre et avec substitution en faveur des enfants qui naîtraient du dit Lucien Terrien, en légitime mariage, et à leur défaut, en faveur de celles de ses sœurs qui lui survivraient et à défaut de ces dernières, en faveur de ses oncles et tantes paternels. Moïse Terrien & A. Labonté et uxor

Le dit Jean-Baptiste Terrien est décédé le 14 octobre 1854, laissant deux enfants mineurs, savoir le dit Lucien Terrien et Rose Délima Terrien, l'intimée en cette cause. Aussitôt après son décès, sa veuve, Dame Flavie Hébert, a été nommée tutrice aux dits enfants mineurs et a exercé cette charge jusqu'en avril 1860, époque où elle a été remplacée par l'appelant Moïse Terrien, oncle paternel des dits enfants mineurs.

Le testament n'a été enregistré qu'en février 1868.

Le 26 avril 1875, Lucien Terrien est décédé sans laisser d'enfants et, en février 1879, les intimés ont intenté la présente action, par laquelle ils réclament de l'appelant, qui s'en était rendu adjudicataire à une vente par le shérif le 26 juin 1868, l'immeuble en question en cette cause comme appartenant à l'intimée Rose Terrien, en vertu de la substitution créée en sa faveur par le testament du 5 octobre 1854.

L'appelant a rencontré cette action par plusieurs défenses.

Dans la première, il se plaint que les demandeurs ne donnent pas dans leur action le numéro sous lequel l'immeuble en question est désigné aux plan et livre de renvoi officiels.

Dans une autre défense, il allègue l'existence de certaines hypothèques grevant le dit immeuble et remontant à l'année 1864 et le décret, par le shérif, du dit immeuble, dans une cause dans laquelle les dites hypothèques étaient apparentes et ont été payées ; il conclut, qu'en conséquence ce décret a purgé la dite substitution et que la demanderesse n'a aucun droit à la propriété du dit immeuble, dont le défendeur appelant est le seul et légitime propriétaire en vertu de la vente et adjudication à lui faites comme susdit.

Il a de plus produit une défense au fonds en fait.

Le jugement de la Cour de première instance a maintenu l'action des intimés et condamné l'appelant à leur abandonner l'immeuble revendiqué. L'appel est de ce jugement.

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TESSIER, J. *dissentiens.*—Le factum des intimés et le jugement, très bien motivé, expliquent au long les faits et les questions de droit en cette cause ; il serait oiseux d'en faire la répétition.

Je rappelle donc sommairement que les appelés à la substitution réclament, par action pétitoire, l'immeuble à eux substitué par le testament de leur aïeul du 5 octobre 1854.

Ce testament n'a été enregistré qu'en février 1868. En 1860 le défendeur Moïse Terrien, oncle des intimés, a été nommé tuteur à Rose Terrien, l'intimée. Il a négligé de faire enregistrer ce testament avant 1868, et en juin 1868 il s'est rendu adjudicataire de cet immeuble, qu'il possède. Il oppose ce décret fait pour des dettes, non pas créées par le testateur subtituant, mais par le grevé Lucien, son fils, lesquelles dettes ont été enregistrées avant le testament.

Le jugement a maintenu l'action *pétitoire* contre Moïse Terrien, le ci-devant tuteur, adjudicataire. Ce jugement me parait certainement correct à tous les points de vue.

Inter alia. 1o. Le tuteur adjudicataire ne peut invoquer le défaut d'enregistrement dû à sa négligence. Ceci est statué par l'article 942 du C. C. dans lequel on lit : " Les tuteurs ou curateurs au grevé ou aux appelés sont tenus de faire effectuer l'enregistrement des substitutions, lorsqu'ils en connaissent l'existence." Et plus bas : " Ceux qui sont tenus de faire effectuer l'enregistrement de la substitution et leurs héritiers et légataires universels ou à titre universel ne peuvent se prévaloir de son défaut." Il est présumé avoir eu connaissance de ce testament, qui d'ailleurs était enregistré *avant le décret*

2o. Les dettes antérieures, qui peuvent purger la substitution non ouverte, à l'aide du décret ne sont que celles qui ont été créées par " *le substituant ou les hypothèques antérieures à* " *sa possession.*" Ce sont les termes mêmes de l'article 953 du Code civil. Les dettes que l'on oppose n'ont pas ce caractère.

3o. Les créances hypothécaires créées par Lucien Terrien, le grevé de substitution, n'ont pu avoir *effet* sans que et jusqu'à ce que le titre de Lucien Terrien, (c'est le testament en question), fût enregistré. Elles n'ont pris rang et *effet* qu'après l'enregistrement du testament. Ainsi le veulent l'article 2098 du Code civil et les derniers précédents de nos cours dont nous citons entre autres *Gauthier & Valois*, XVIII L. C. J., 26,

Lefebvre & Branchaud, XXII L. C. J., 73, *Pacaud vs. Constant*, IV Q. L. R., 94, *Amiot vs. Tremblay*, II L. N., 196.

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4o. L'adjudication au *tuteur* par le shérif en juin 1868 est nul; c'était le bien de ses pupilles; le testament était alors enregistré (février 1868), cette publicité lui donnait connaissance de la substitution, que d'ailleurs il ne pouvait ignorer.

Art. 290 du Code civil. Art. 1484 C. C.

5o. Le décret ne purge pas la substitution non ouverte et la *vente est résolue* par l'ouverture de la substitution, ainsi le dit l'art. 950 du Code civil, et l'art. 710 du Code de procédure.

Je suis donc pour confirmer ce jugement.

N. B. C'est une subtilité de dire que les intimés ont droit seulement à une action en dommages : quel dommage ? c'est d'être privé de leur bien, ils le reprennent par ce jugement. S'il y a des améliorations, elles pourront être compensées avec les fruits et revenus ou autrement réclamées.

Voici le jugement de la Cour d'Appel :

The Court, &c.

Considering that the Appellant is impleaded by petitory action and that he hath shown a good title to the real estate described in the said action, which title is not in any way impugned by Respondents;

and Considering that there is error in the judgment of the Court below, maintaining Respondents' action, to-wit the judgment of the Superior Court for Lower Canada, sitting at St. John, in the district of Iberville, on the 20th day of december 1879;

Doth reverse the judgment aforesaid, and Proceeding to render the judgment which the Court below ought to have rendered, Doth dismiss respondents' action with costs in the Court below and also with the costs of this appeal, Reserving to the said Respondents any rights they may have in and to the property in this case mentioned.

Jugement infirmé.

E. Z. Paradis, Avocat de l'Appelant.

C. A. Geoffrion, Conseil.

W. W. Robertson, Avocat des Intimés.

MONTRÉAL, 16 DÉCEMBRE 1881.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 143.

LUCIEN TERRIEN, FILS DE MOISE,

Défendeur en Cour Inférieure,

APPELANT ;

ET

ABRAHAM LABONTÉ & UXOR,

Demandeurs en Cour Inférieure,

INTIMÉS.

JUGÉ :—Que le donataire dans une donation, même gratuite, faite par un ascendant à son héritier présomptif n'est qu'un ayant cause à titre particulier et qu'il peut invoquer à l'encontre d'une action pétitoire des moyens d'exception, dont ne pourrait se prévaloir le donateur lui-même.

Dans cette cause les faits sont les mêmes que dans la précédente, avec une légère différénce, cependant, que nous allons indiquer.

Ici, l'intimée Rose Terrien réclame un autre immeuble en vertu de la substitution créée en sa faveur par le même testament, mais que Moïse Terrien a acquis, non pas par un décret, comme dans le premier cas, mais par une vente privée à lui consentie par Lucien Terrien, fils de Jean-Baptiste, le 23 novembre 1866, c'est-à-dire plus d'un an avant l'enregistrement du testament. Lucien Terrien, fils de Moïse, l'appelant en cette cause, a pris possession de ce dernier immeuble, en vertu d'un acte du 10 avril 1876, enregistré le 3 mai suivant.

L'appelant a plaidé à cette action, 1o. en invoquant les mêmes moyens que Moïse Terrien dans sa première défense; 2o. par une défense dans laquelle il allègue que Lucien Terrien, fils de Jean-Baptiste, a acheté à une vente judiciaire la moitié indivise de l'immeuble en question en cette cause, lequel appartenait à sa mère Flavie Hébert, et que plus tard, par acte passé le 23 novembre 1866 et enrégistré le 1er mars suivant, environ un an avant l'enregistrement du testament de Jean-Baptiste Terrien, il a revendu au dit Moïse Terrien tout l'immeuble décrit en la déclaration en cette cause ; il relate aussi son propre titre d'acquisition, et prétend que la dite substitution, n'ayant pas été enregistrée dans les délais voulus, ne peut valoir à l'encontre de ses titres dûment enregistrés. Il allègue en outre que le dit immeuble était un conquêt de la communauté entre feu Jean-Baptiste Terrien et son

épouse, Flavie Hébert, et que la moitié indivise provenant de cette dernière, n'a jamais été sujette à la dite substitution, et que les Demandeurs ne pourraient se prévaloir par action pétitoire, mais seulement par une action en partage et licitation ; 3o. par une défense au fonds en faits.

La Cour de première instance a condamné l'appelant à remettre aux intimés la possession de la moitié indivise de l'immeuble revendiqué, si les parties pouvaient s'entendre pour en faire le partage à l'amiable ; sinon les parties devaient se pourvoir par action en partage. Les frais de cette dernière action étaient divisés.

Ce jugement a aussi été infirmé en Cour d'Appel, l'honorable juge Tessier, différant.

TESSIER, J. *dissentiens.*—Cette seconde cause ne diffère de la première qu'en deux points.

1o. Au lieu d'un décret, c'est ici une vente privée faite le 23 nov. 1866, par Lucien Terrien, le grevé, fils de Jean-Bte., à son oncle Moïse Terrien, tuteur de *Rose* Terrien, la demanderesse intimée, appelée à la substitution.

2o. Que lors de cette vente du 23 nov. 1866, le testament n'était pas encore enregistré.

Cependant les mêmes raisons s'appliquent pour maintenir le jugement rendu.

Inter alia. 1o. C'est toujours le *tuteur Moïse*, qui est l'acquéreur du bien de sa pupille *Rose* Terrien, il ne peut invoquer le défaut d'enregistrement dû à sa négligence, art. 942 C. C.

2o. L'acquisition par le tuteur du bien de sa pupille est radicalement nulle, art. 290, 1484 du Code civil.

3o. La vente est *résolue* par l'ouverture de la substitution, art. 950 du Code civil.

4o. Lucien Terrien, l'appelant, *fils de Moïse*, a eu cet immeuble de son père le 10 avril 1876, c'est tout au plus un acte fait en avancement d'hoirie entre le père et le fils ; il n'a pu acquérir plus de droits qu'en avait son père. Or tous les deux n'ont acquis aucun droit par la vente qui était *sans effet* d'après l'art. 2098jusqu'à ce que le testament, le titre du vendeur *Lucien le grevé*, fût enregistré.

5o. Moïse, le tuteur, l'oncle de Rose, l'appelée, prétend n'avoir pas eu connaissance du testament. Toutes les présomp-

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tions de droit sont contre lui. C'était son devoir de faire l'inventaire des biens des mineurs, d'avoir leurs titres, etc., s'il eût fait son devoir, s'il eût pris soin des biens des mineurs, autrement qu'en les acquérant à son propre nom, il eût connu le testament; il le connaissait, il ne peut y en avoir doute. C'était à lui de prouver que par quelque artifice, ce testament avait été caché. Il ne l'a pas fait. D'ailleurs il est dit qu'il n'a pas *plaidé* ce défaut de connaissance.

6o. Il est question dans les deux causes du défaut de *No. du cadastre* dans une action pétitoire ; c'eut été mieux, mais ce n'est pas à peine de nullité, la Cour n'a pas à la prononcer, si la loi ne la prononce pas.

7o. Au lieu d'une action pétitoire, c'eut dû être, dit l'appelant, une action en partage. Le juge a rédigé son jugement de manière à rencontrer cette objection, et il n'a pas accordé de frais contre l'appelant défendeur à cause de cela. Le défendeur n'en souffre donc aucun grief.

Je conclus donc à confirmer.

Voici le jugement de la Cour d'Appel :

Considering that the Appellant is impleaded by petitory action, and that, under the terms of article 940 of the Civil Code, the want of registration of the deed of gift under which Respondents claim to be owners of the real estate in question, may be invoked by those holding in good faith, by particular title, whether onerous or gratuitous ;

Considering that appellant holds by particular title, and that no bad faith on his part is alleged ;

Considering that there is error in the judgment of the Court below, to-wit the judgment of the Superior Court for Lower Canada, sitting at St. John, in the district of Iberville, on the 20th day of december 1879 ;

Doth reverse the judgment aforesaid and Proceeding to render the judgment which the Court below ought to have rendered, Doth dismiss Respondents' action with costs in the Court below, and also with costs of this appeal, Reserving to the said Respondents any rights they may have in and to the property in this case mentioned.

Jugement infirmé

E. Z. Paradis, Avocat de l'Appelant.

C. A. Geoffrion, Conseil.

W. W. Robertson, Avocat des Intimés.

MONTRÉAL, 19 JANVIER 1882.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 160.

A. S. ARCHAMBAULT & UXOR,

Défendeurs en Cour Inférieure,

APPELANTS ;

&

J. B. LAMÈRE & AL,

Demandeurs en Cour Inférieure,

INTIMÉS.

JUGÉ :—Que le créancier qui a fait assurer la propriété de son débiteur et qui a reçu le montant de cette assurance, ne peut recouvrer de son débiteur que la balance de sa créance, après déduction du montant reçu, moins les primes payées et l'intérêt sur ces primes.

Cette action a été intentée par les intimés, exécuteurs de la succession de feu John Pratt, pour recouvrer une somme de $882, balance d'une obligation du 20 février 1856, par les appelants à l'ancienne société commerciale de Galarneau & Roy et transportée en 1859 par P. M. Galarneau, représentant de la maison sociale de Galarneau & Roy, à feu John Pratt.

Le transport fut fait comme sûreté collatérale pour le paiement de certains bons de la raison sociale de Galarneau & Roy, alors entre les mains de Pratt.

Les appelants ont plaidé que John Pratt avait été payé en entier de la réclamation pour laquelle le transport avait été fait et que les intimés n'étaient que le *prête-nom* de Galarneau, qui avait reçu, en son propre nom, tous les paiements faits depuis 1868 ; que, le 3 septembre 1876, il ne restait dû sur le montant de la réclamation qu'une somme de $534.87 ; que Galarneau avait antérieurement assuré la propriété hypothéquée par l'obligation pour $800, et que la propriété ayant été détruite par le feu, le 16 septembre 1876, il a reçu le montant de son assurance, qui excédait la balance alors due par les appelants, et par leurs conclusions, ils ont demandé le renvoi de l'action.

Par leurs réponses, les intimés ont allégué que les paiements faits à Galarneau, depuis le transport, lui ont été faits en sa qualité d'agent de Pratt, et que les appelants n'avaient pas droit de demander crédit pour le montant reçu par Galarneau, parce que l'assurance n'avait pas éteint la créance des

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intimés, puisque Galarneau avait assuré en son propre nom et avait payé toutes les primes.

Sur cette contestation la Cour de première instance, renvoyant les exceptions des appelants, les a condamnés à payer aux intimés le montant réclamé.

Cross, J.—After stating the facts of the case continued; —the evidence shows clearly that the action is only brought in the interest of Galarneau. The transfer of the obligation was made to secure certain claims which have long since been paid, and since 1868, Galarneau has acted as being the only creditor, and has given all the receipts in his own name, without any reference to the transfer. The title, however, is still in the name of the Pratt estate, and the action is well brought in the name of the executors, since they can give a valid discharge; but as they act in Galarneau's interest, their demand is subject to all the equities which might be opposed to the latter.

This question being disposed of, the contestation is narrowed to two other points. 1st. Are the appellants entitled to a reduction of $100 which they pretend to have paid on the 6th of february 1861, and for which the respondents have not given them credit in their account; 2ly. whether the appellants ought to be credited with the sum of $800 less premium paid, which Galarneau has received from the Royal Insurance Company, in september 1876.

On the first point, we do not find, that the appellants have sufficiently established they were entitled to the credit which they claim. They have produced no receipt for this sum of $100—the accounts on which they rely are not conclusive, and by the evidence of their own witness, it has been proved that one or two receipts which had been given for payments made on the obligation were returned to Galarneau pursuant to an agreement contained in a deed which is produced by the respondents, that the sums represented by these receipts should be imputed on other claims of Galarneau. Under these circumstances, it is impossible to say, in the absence of a receipt that the appellants are entitled to be credited for this sum of $100.

The other question is not without some difficulty. We

think, however, that it is but just, that, the appellants should have credit for amount of the insurance which Galarneau has received, owing to the destruction by fire of the property which belonged to the appellants and on which he had effected an insurance. This view is fully borne out by the French authorities and clearly expressed by Boudousquié, in his *Traité de l'assurance*, Nos. 328, 330 and 337. The judgment of the Court below will be reformed by deducting from the amount claimed, the sum of $800 received for insurance, less the amount paid for premiums and interest on the same.

DORION, J. C.—Je concours dans l'opinion que les appelants n'ont pas établi, d'une manière satisfaisante, que la somme de $100 qu'ils allèguent avoir payée le 6 février 1861, doive être imputée sur leur obligation.

Quant à la somme reçue pour assurance, nous nous trouvons en présence de deux règles diamétralement opposées. D'après la jurisprudence anglaise l'assuré peut, après avoir été indemnisé par l'assurance, poursuivre le recouvrement de la créance assurée et conserver son recours contre toutes les personnes qui auraient été tenues de l'indemniser s'il n'avait pas été assuré. Il est dans ce cas censé agir pour l'assureur ; *Bradburn & Great Western Railway Co.*, L. R. 10. Exchequer 1 ; *Yates* & *White*, 4 Bingham. N. C. 272 ; *Jones & White*, 2 Jur. 303 ; *Clark & Blything*, 2 B. & C., 254 ; 2 Marshall, On Insurance, 796.

La même règle semble prévaloir aux Etats-Unis, May, On Insurance, p. 559 ; Angell, On Ins., p. 118, 119, 193 ; *King* v. *State Mutual Fire Insurance Co.*, 7 Cushing 1. Voir aussi Flanders, On Fire Insurance, p. 400 et 401, Note 1, qui cite des décisions dans ce sens, et dans Ontario, *McPherson & Proudfoot*, 2 C. P. U. C. 57 ; *Russell & Robertson*, 6 L. J. 143 ; *McIntosh & The Ontario Bank*, 20 chy. 24.

En France, au contraire, l'assuré qui a une fois été indemnisé de ses pertes n'a plus de recours contre qui que ce soit, et, en payant le montant de l'assurance, l'assureur a droit à la cession des droits de l'assuré, (art. 2584, C. C., Pothier, Contrat d'assurance, Nos. 50 et 65).

Toullier, T. II, No. 174, dit à ce sujet : "Dans l'ancienne 'jurisprudence, quand les personnes incendiées par la faute

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" du voisin, qui l'a été lui-même, étaient indemnisées de " leurs pertes par la décharge des tailles et de la capitation, " qui s'accordait ordinairement en pareil cas, ou par les se- " cours que les personnes charitables donnent aux incendiés, " on leur refusait un recours contre les propriétaires des bâti- " ments où l'incendie avait commencé. Denisart, Vo. Incen- " die, No. 10, rapporte un arrêt du 1er août 1744, qui préjuge " clairement cette question."

" Cette décision est évidemment conforme à la justice, qui " ne permet pas à l'incendié de se procurer une double indem- " nité de ses pertes, aux dépens d'un malheureux déjà très à " plaindre par les pertes qu'il a lui-même souffertes.

Ibidem, No. 175 : " La même décision doit s'appliquer au " cas où la maison incendiée étant assurée, le propriétaire " a été entièrement indemnisé de ses pertes par la compagnie " royale d'assurance, autorisée par l'ordonnance du 11 février " 1820."

" Mais alors cette compagnie peut à ses risques, comme su- " brogée aux droits de l'assuré, exercer les actions de celui-ci, " contre ceux, chez qui le feu a cemmencé, où contre le loca- " taire de la maison assurée.

Boudousquié, *Traité de l'assurance*, *No.* 328. " Indépendam- " ment de la libération de l'assureur, le paiement a pour effet " de le subroger dans tous les droits, recours et actions que " le sinistre fait naître, en faveur de l'assuré, contre les au- " teurs reconnus ou présumés de l'incendie, les locataires, les " propriétaires voisins, et généralement contre tous garants " quels qu'ils puissent être."

Au No. 330, p. 384, l'auteur ajoute : " S'il en était autre- " ment (c.-à-d. si l'assureur n'était pas subrogé de plein droit à " l'assuré) il s'en suivrait ou que l'assuré après avoir été in- " demnisé par l'assureur, pourrait encore exercer son recours " contre le tiers-garant, *et recevoir une double indemnité, ce qui* " *est contraire à tous les principes du contrat d'assurance ;* ou " bien que les tiers-garants étant tenus d'une dette qui ne " pourrait être exigée par personne, il y aurait un débiteur " sans créancier, une obligation sans action, ce qui est une " véritable anomalie."

Au No. 337, l'auteur continue : " L'assureur qui a payé " l'indemnité due en vertu de l'assurance d'une créance hy- " pothécaire est subrogé aux droits du créancier et peut exer-

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" cer contre le débiteur l'action personnelle, qui existe indé-
" pendamment de l'action réelle ....
" .... On peut donc appliquer à ce cas les principes
" que nous avons développés au No. 330."

L'auteur a prévu le cas précis qui nous occupe et les principes qu'il a développés au No. 330 et qu'il applique à celui-ci, c'est que l'assuré ne peut, dans aucun cas, recevoir une double indemnité et que l'assureur seul peut, lorsqu'il a payé, exercer le recours que l'assuré aurait pu exercer s'il n'avait pas été indemnisé. Cela ne veut pas dire cependant que l'assureur ne pourrait se servir du nom de l'assuré pour exercer ses droits contre les appelants, mais ce n'est pas le cas ici. C'est l'assuré qui prétend avoir le droit de recouvrer pour son propre compte la créance dont il a été payé par l'assurance.

Alauzet, Traité des assurances, t. 2, No. 480, p. 391.

" Une fois qu'il (l'assureur) a payé, les droits de l'assuré " sont éteints, comment les cédera-t-il ? Il est bien reconnu " que l'assuré indemnisé ne peut pas poursuivre le paiement " d'une seconde indemnité contre qui que ce soit."

Idem, p. 410 et 411. " Le propriétaire ne peut être indemnisé " qu'une fois." Quénault, No. 325 ; Hettier, § 4, p. 300 ; Grun & Joliat, Nos. 294, 300, p. 349.

Pardessus, t. 5, p. 613, No. 595, 5o. " D'un autre côté, serait-" il juste que déjà indemnisé par l'assureur, l'assuré touchât " une seconde fois une indemnité de l'incendiaire ? C'est donc " à l'assureur que l'indemnité est due." *Idem*, No. 595, 6o. ; Vincens, Leg. com., t. 3, p. 203.

Avec un tel concours d'autorités, il est impossible de ne pas reconnaître que d'après les règles du droit français, l'assuré une fois indemnisé ne peut réclamer une seconde indemnité et que, comme le disent plusieurs des auteurs cités, il n'a plus de recours contre qui que ce soit ; et comme c'est d'après le droit français que nous devons juger cette cause, nous croyons que les appelants ont le droit d'obliger les intimés de déduire, du montant qu'ils réclament, ce que Galarneau a reçu de l'assurance, moins les primes qu'il a payées.

L'on a cité à l'audience la cause de *Archambault & ux*, & *Galarneau* (22 L. C. J., 105), dans laquelle il parait avoir été jugé : " qu'un créancier qui a fait assurer la propriété de son " débiteur à ses propres frais, n'est pas tenu de donner crédit

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" à son débiteur d'aucune partie de la somme qui lui a été " payée sur son assurance."

Le nom des parties pourrait faire supposer qu'il s'agissait dans cette cause de la même assurance, que celle qui fait l'objet de la contestation actuelle. Cependant les intimés n'ont pas invoqué que ce ce jugement fut chose jugée dans cette cause ci, et nous ne pouvons considérer ce jugement que comme une décision émanée d'une Cour supérieure et méritant à tous égards notre plus sérieuse attention. Le rapport de cette cause est très imparfait et ne contient aucun développement qui puisse nous faire connaître les circonstances de la cause. Aucune autorité ne paraît avoir été citée à l'appui de cette décision et la cause se présentait sous des circonstances toutes différentes. Là, c'était un débiteur qui disait à son créancier, rendez-moi ce que l'assureur vous a payé sur la créance que vous aviez contre moi. A cette demande le créancier pouvait peut-être répondre, vous n'avez fait que payer votre dette et si je dois cette somme à quelqu'un, ce n'est pas à vous, c'est à l'assureur de qui je l'ai reçue et qui est subrogé à mes droits.

Ici le débiteur dit à son créancier, vous avez été payé de votre créance et vous ne pouvez demander à être payé une seconde fois. Pour décider cette question, il n'est pas nécessaire d'entrer dans les considérations, qui auraient pu s'appliquer à l'autre cause et qui n'ont pas d'application à celle-ci; il suffit d'appliquer ce principe qui domine toute l'économie de notre droit, que personne ne peut exiger deux fois le paiement de sa créance.

Ramsay, J.—The difference between the English and the French rule on this question no doubt arises from the peculiarities of the English law and the difference under the two systems of laws, in the mode of recovering a transferred claim.

There is, however, no rule more certain in the French law than that a creditor cannot be paid twice. It is as old as the civil law from which it is derived. Mr. Galarneau would certainly be paid twice, if he could retain the amount which he has received for the insurance effected on the appellants' property to secure his claim and also claim from them the amount of his mortgage. If this was allowed he would be

paid twice, while the appellants would pay their debt and loose their property besides.

It is quite immaterial, as far as this case is concerned, whether the hypothec belongs to the respondents as representing the Pratt estate, or belongs to Galarneau, for if it still belongs to the estate Pratt, Galarneau who was the agent of Pratt has received the insurance for him, since having parted with the hypothec he could not receive for himself what was due to his principal ;—if on the other hand, he was the creditor of the hypothec at the time, he has received what was due to him and in both cases, the appellants are entitled to be credited with the amount received less the premiums.

Judgment reformed.

N. Archambault, attorney for appellants.
C. A. Geoffrion, counsel.
Lacoste & Globensky, for respondents.

QUEBEC, 7 DECEMBRE 1881.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No.

ALPHONSE POULIN,

Demandeur en Cour Inférieure,
APPELANT ;

&

LA CORPORATION DE QUÉBEC,

Défenderesse en Cour Inférieure,
INTIMÉE.

JUGÉ :— 1o. Que l'acte 42-43 Vict. ch. 4, Québec, qui oblige ceux qui vendent des liqueurs spiritueuses à fermer leur établissement, le dimanche, et de minuit à cinq heures du matin, les autres jours, n'est pas *ultra vires*.

2o. Que toute personne qui ne ferme pas, le dimanche, et de minuit à cinq heures du matin, les autres jours, l'établissement où elle vend ordinairement des liqueurs spiritueuses, ou qui pendant les mêmes périodes vend des liqueurs spiritueuses, encourt la pénalité imposée par la 1re clause de cet acte, à moins qu'elle ne soit comprise dans l'exception contenue dans la 5e clause du même acte.

L'appelant a été poursuivi en vertu du statut de Québec passé dans la 42-43 Vict. ch. 4, s. 1, pour n'avoir pas fermé pendant toute la journée du dimanche, 18 janvier 1880, la maison où il vendait des liqueurs spiritueuses.

A cette poursuite il a plaidé que le recorder n'avait pas de juridiction, parce que le statut que l'on invoquait n'autorisait

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pas une semblable poursuite, et en second lieu, parce que le statut était *ultra vires* et qu'il n'appartenait qu'au parlement de la Puissance de régler et de restreindre la vente des liqueurs spiritueuses.

Cette défense a été écartée et l'appelant condamné à payer une amende de $40.

Il a demandé un bref de prohibition pour enjoindre au recorder de ne pas exécuter ce jugement, et sur le mérite, la Cour Supérieure a maintenu la décision du recorder et rejeté le bref de prohibition.

L'appelant a interjeté appel de ce jugement.

Dorion, J. C.—Deux questions nous sont soumises.

1o. Le statut 42-43 Vict. c. 4, est-il inconstitutionnel ?

2o. Si ce statut n'est pas *ultra vires* les faits mentionnés dans la plainte donnent-ils lieu à une poursuite en vertu de ce statut ?

Sur la première question je serais disposé à dire que les mots "*trafic et commerce*" dans le second paragraphe de la section 91 de l'acte de l'Amérique britannique du Nord, ne doivent pas être interprétés dans le sens le plus étendu et comme comprenant tout trafic ou commerce quelconque, même les plus insignifiants actes de commerce local, et que sous ce rapport le statut de Québec tout en restreignant en quelque sorte le trafic des liqueurs enivrantes n'est pas *ultra vires*. Cette question a été décidée plusieurs fois dans ce sens dans la province d'Ontario. (In re, Slavin & the Corp. of the village of Orillia, 36 Q. B. U. C. 159 ; Re Harris & the Corp. of the city of Hamilton, 44 Q. B. U. C. 641 ; Regina & Taylor, 36 Q. B. U. C. 183.) Mais nous sommes tous d'accord pour dire qu'il n'est pas nécessaire de décider cette question dans cette cause. Le statut dont il s'agit n'a pas été fait pour règlementer la vente des liqueurs spiritueuses. C'est une mesure de police adoptée pour assurer le bon ordre et la paix publique. C'est là une matière purement locale et qui comme telle est soumise à l'autorité des législatures provinciales, en vertu du seizième paragraphe de la section 92 de l'acte de l'Amérique britannique du Nord.

La seconde question présente plus de difficulté.

La section première de l'acte 42-43 Vict. c. 4, est dans les termes suivants :

1. " Toute personne licenciée ou non licenciée pour vendre dans une cité, ville ou village quelconque, des liqueurs spiritueuses en détail, en quantité moindre de trois demiards à la fois, du vin, de la bière ou des liqueurs de tempérance, devra fermer la maison ou le bâtiment dans lequel elle vend ou fait vendre, ou permet qu'il soit vendu telles liqueurs, tous et chacun des jours de la semaine, depuis minuit jusqu'à cinq heures du matin, et durant toute la journée de tout et chaque dimanche de l'année ; et durant ces périodes de temps, aucune telle personne ne fera vendre ou ne vendra ou ne permettra d'être vendu, délivré ou ne fera délivrer dans telle maison ou bâtiment, ou en aucun autre lieu, des liqueurs spiritueuses, vin, bière, ou liqueurs de tempérance, le tout sous peine, pour toute et chaque infraction aux présentes dispositions, d'une amende de pas moins de trente piastres et n'excédant pas soixante-et-quinze piastre et les frais, et à défaut du paiement de la dite amende à un emprisonnement n'excédant pas trois mois dans la prison commune du district où la contravention a eu lieu."

Cette disposition est assez singulièrement rédigée pour donner lieu à des difficultés sérieuses.

L'on commence par dire que, " toute personne *licenciée* ou " *non licenciée*, etc." Ce qui était pour le moins inutile si l'on voulait dire que toute personne quelconque serait tenue de fermer l'établissement, où elle vendait des boissons, de minuit à cinq heures du matin et de plus toute la journée de chaque dimanche de l'année ; mais il est probable que ce que l'on a voulu dire, c'est que toute personne ayant une licence pour vendre des liqueurs soit par trois demiards ou plus serait tenue de fermer son établissement de minuit à cinq heures du matin et en outre le dimanche, tout en fesant exception pour les cas prévus dans la cinquième clause du même acte.

La difficulté ici ne résulte pas de la mauvaise rédaction de cette première partie de la clause, mais bien de la seconde partie qui est reliée à la première par la conjonction " et ", en sorte qu'il est très difficile de dire si, lorsqu'on a imposé à

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toute personne vendant des liqueurs l'obligation de fermer son établissement à certains jours et à certaines heures, et celle de ne pas vendre de liqueurs pendant les mêmes périodes, l'on a voulu faire deux offenses ou une seule, de la violation de ces dispositions.

Si pour enfreindre le statut, il faut et tenir sa maison ouverte et vendre des liqueurs spiritueuses, il est certain que la plainte faite par l'appelant ne décrit aucune offense, puisqu'il n'est accusé que de n'avoir pas fermé sa maison dans la journée du dimanche, 18 janvier 1880. Si au contraire le fait de ne pas fermer sa maison un dimanche constitue une offense et le fait de vendre de la boisson en constitue une autre, l'acte d'accusation serait suffisant. Dans le premier cas je serais d'opinion que le recorder n'aurait pas eu de juridiction, puisqu'il n'est autorisé à prendre connaissance que des offenses contre le statut et non de faits qui a eux seuls ne constituent pas une offense et ne sont pas punissables d'après la loi, ainsi que nous l'avons jugé dans la cause d'*O'Farrell* et *Brassard.*

Mais en examinant attentivement toutes les parties de la clause, je suis demeuré convaincu que l'intention du législateur a été de créer deux offenses distinctes,—et que nonobstant la conjonction "et" il faut lire la clause comme si elle formait deux dispositions distinctes, dans deux clauses séparées.

Ce que le législateur a voulu prohiber, c'est la vente des liqueurs spiritueuses pendant la nuit et le dimanche. L'obligation de clore leurs établissements n'a été imposée aux vendeurs de liqueurs spiritueuses que pour mieux assurer l'objet principal et dispenser de la preuve de la vente toujours plus ou moins difficile à faire. S'il fallait tout à la fois ne pas fermer son établissement et vendre de la boisson pour être passible de l'amende imposée pour violation des dispositions de l'acte, l'appelant aurait pu fermer sa maison à minuit ou un samedi soir et vendre de la boisson toute la nuit ou toute la journée du dimanche aux personnes qui seraient entrées avant minuit, sans commettre d'infraction à la loi ;—mais il y a plus, la même clause défend également à toute personne de vendre de la boisson dans sa maison ou *ailleurs*, et l'appelant en fermant sa maison aurait pu vendre de la boisson dans sa cour ou ailleurs sans enfreindre la loi et sans encourir de pénalité.

Nous ne pouvons donner à la loi une interprétation si opposée à l'intention évidente du législateur et qui détruirait l'objet qu'il avait en vue. Aussi, nous sommes d'opinion que la pénalité est encourue lorsque la personne qui a une licence pour vendre de la boisson et qui, comme l'appelant, ne se trouve pas dans l'une des exceptions prévues par la cinquième section du même acte, ne ferme pas son établissement pendant les heures prohibées, tout aussi bien que lorsque, pendant les mêmes heures, elle vend de la boisson.

Le jugement de la Cour Supérieure doit donc être confirmé

M. le juge Ramsay concourt dans le jugement, mais pour d'autres motifs.

Montambault, *Langelier* & *Langelier*, pour l'appelant.

Pelletier & *Chouinard*, pour l'intimée.

MONTRÉAL, 20 SEPTEMBRE, 1881.

Coram DORION, J. C., MONK, RAMSAY, TESSIER, CROSS, J. J.

No. 416.

WILLIAM H. FELTON,

Opposant en Cour Inférieure,

APPELANT;

ET

L. C. BÉLANGER & AL,

Demandeurs en Cour Inférieure,

INTIMÉS.

JUGÉ :— Que le cautionnement pour appel d'un jugement de la Cour de Circuit doit être dans les termes de l'art. 1143—que l'appelant poursuivra l'appel, répondra à la condamnation et paiera les frais au cas où le jugement serait confirmé ;—et qu'une obligation de la part de la caution de payer une somme de $200 dans le cas où l'appelant ne poursuivrait pas l'appel, ne répondrait pas à la condamnation et ne paierait pas les frais si le jugement est confirmé, n'est pas un cautionnement suffisant.

DORION, J. C.— L'appelant, dont l'opposition afin d'annuler a été rejetée à la Cour de Circuit de Sherbrooke, a donné caution pour appel.

La caution a déclaré qu'elle se reconnaissait endettée en une somme de $200 envers les intimés, la condition de cette

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obligation étant que si l'appelant ne poursuivait pas son appel, ou ne répondait pas à la condamnation et ne payait pas les frais, son obligation serait bonne et valable ; autrement elle serait nulle.

Les intimés ont fait motion pour rejeter l'appel,

1o. Parce que le cautionnement avait été donné un dimanche ; 2o. parce que le cautionnement est insuffisant et ne couvre pas la dette, les intérêts et les frais ; 3o. parce que la signification de la requête en appel n'a pas été accompagnée d'une copie du cautionnement ; 4o. parce que la requête ne contient pas les raisons de l'appel.

En tête du cautionnement il est déclaré que la caution a comparu le 17 juillet, qui était un dimanche, mais ce cautionnement a été reçu par le juge du district de St-François, et au bas de son attestation, on trouve la date du 16 juillet 1881. C'est donc évidemment le 16 juillet que le cautionnement a été reçu, et non pas le 17. Cette date ne se trouve dans le corps de l'acte que par une erreur cléricale. Comme cette erreur ne peut être préjudiciable à l'Intimé, elle n'est pas fatale.

Quant à la troisième objection que la signification de la requête est irrégulière, il a été fait aux intimés signification de deux requêtes, le même jour, et à l'une de ces requêtes était annexée une copie du cautionnement, et nous croyons que cela suffit pour satisfaire au vœu de la loi. Cette requête indique suffisamment les raisons sur lesquelles l'appelant se fonde pour demander que le jugement qui a renvoyé son opposition soit infirmé.

Il ne reste plus que cette autre raison fondée sur le fait que le cautionnement ne couvre pas la condamnation pour la dette, les intérêts et les frais.

L'article 1143 du Code de procédure civile dit : "La partie "qui veut appeler, (il s'agit ici d'un jugement de la Cour de "Circuit), doit, dans les quinze jours après la prononciation "du jugement, mais sans être tenue d'en donner avis, four- "nir bonnes et suffisantes cautions, qui doivent justifier à la "satisfaction de celui qui reçoit le cautionnement, qu'elle "poursuivra l'appel, répondra à la condamnation et paiera "les frais au cas où le jugement serait confirmé."

L'article 1145 déclare qu'une seule caution suffit, si elle est propriétaire d'immeubles valant $200 en sus de toutes les charges dont ils sont grevés. Wm. H. Felton & L. C. Bélanger et al.

L'appelant, au lieu de fournir son cautionnement dans les termes de l'article 1143, qui veut que la caution s'oblige de payer si l'appelant ne poursuivait pas l'appel, ou ne répondait pas à la condamnation et ne payait pas les frais au cas où le jugement serait confirmé, a simplement fourni une caution qui s'est obligée de payer $200, si l'appelant ne satisfaisait pas aux obligations imposées par cet article. Quel que soit le montant des condamnations qui pourront être prononcées contre l'appelant, sa caution ne sera jamais tenue au-delà d'un montant de $200.

Ce n'est pas là l'obligation que la loi impose à la caution. Nous savons que les cautionnements pour appel ont longtemps été donnés sous cette forme, qui est encore suivie dans quelques districts ; mais dans le district de Montréal, ainsi que dans plusieurs districts ruraux, le cautionnement est fourni dans les termes mêmes de l'article du Code.

La somme de $200, mentionnée dans l'article 1145, n'est pas pour limiter la responsabilité de la caution à ce montant, mais seulement pour l'obliger à justifier de sa solvabilité jusqu'à, au moins, la somme de $200.

Il est d'autant plus important de ne pas permettre aux parties, qui veulent appeler, de limiter l'obligation des cautions à cette somme de $200, qui sera souvent insuffisante pour couvrir la dette, les intérêts et les frais, que maintenant la juridiction de la Cour de Circuit s'élève à $200.

Nous croyons que le cautionnement n'est pas dans la forme qu'il aurait dû être, mais en même temps comme l'on ne peut imputer une faute grave à l'appelant, qui s'est conformé à la pratique longtemps suivie dans son district, nous déclarons le cautionnement insuffisant, et nous lui permettons de fournir un autre cautionnement conformément à l'article 1143, sous quinze jours. (Cross, J., *dissentiente.*)

Felton & *Blanchard*, pour l'appelant.

L. C. Bélanger, pour les intimés.

MONTRÉAL, 29 NOVEMBRE, 1881.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 460.

AMÉDÉE ARCHAMBAULT,

Demandeur.

&

NARCISSE BOLDUC,

Défendeur.

JUGÉ :— Que pour assigner un défendeur à répondre à une action dans un autre district que celui de son domicile, il faut que tous les faits qui constituent le droit d'action aient eu lieu dans ce district, et que l'on ne peut pas réunir plusieurs actions qui ont pris naissance dans différents districts pour distraire un défendeur de la juridiction de son domicile.

Le défendeur demande la permission d'appeler d'un jugement interlocutoire qui a rejeté l'exception déclinatoire qu'il avait opposée à l'action du demandeur.

L'action est pour fausse arrestation, et le demandeur allègue dans sa déclaration que sur une plainte mal fondée que le défendeur a faite devant le magistrat de police, à Montréal, il a été arrêté et traduit devant le magistrat de police et ensuite libéré : qu'à raison de cette plainte le défendeur a fait circuler contre lui des bruits dommageables, tant à Montréal, qu'à Farnham et à St-Jean.

Le défendeur a décliné la juridiction de la Cour, en alléguant qu'il était domicilié dans le district de Bedford, que l'action ne lui avait pas été signifiée dans le district de Montréal, et enfin que le droit d'action n'avait pas entièrement pris naissance dans le district de Montréal, en sorte qu'il aurait dû être assigné à se défendre devant le tribunal de son domicile et non à Montréal.

La Cour de première instance a renvoyé l'exception déclinatoire en donnant pour motifs qu'il n'était pas clairement établi, par la preuve, que le demandeur n'avait pas été arrêté dans le district de Montréal et en second lieu parce qu'il résultait de la demande, telle que formulée, que le demandeur invoquait diverses causes d'actions distinctes, bien que non incompatibles ; et que l'une au moins de ces causes d'action avait pris naissance dans le district de Montréal, savoir, les

bruits dommageables à sa réputation que le défendeur avait fait circuler et que cette cause était suffisante pour donner juridiction au tribunal siégeant à Montréal, ce qui donnait au demandeur le droit d'y joindre les autres demandes qu'il avait formées contre le défendeur.

Le défendeur demande la permission d'appeler de ce jugement.

DORION, J. C.—Nous ne pouvons admettre que celui qui a plusieurs droits d'action distincts, qui ont pris naissance dans différents districts, puisse traduire son débiteur hors de son domicile devant le tribunal de l'un ou l'autre de ces districts, à son choix.

Il a déjà été décidé plusieurs fois et, notamment dans la cause de *Sénécal* et *Chenevert*, 12 L. C. R. 145, que pour assigner un défendeur à venir répondre à une action dans un autre district que celui de son domicile, il fallait que toute la cause de l'action, c'est-à-dire tous les faits qui constituent le droit d'action eussent eu lieu dans ce district. Or, par analogie, et à plus forte raison, l'on ne peut réunir plusieurs droits d'actions qui ont pris naissance dans différents districts pour distraire un défendeur de sa juridiction ordinaire, qui est celle de son domicile. Le créancier pourrait seulement dans ce cas porter l'une de ses actions dans le district où elle aurait pris son origine, mais en le faisant, il abandonnerait par là ses autres actions, car on ne lui permettrait pas de diviser ses actions. (Art. 15 C. de P. C.)

Mais dans l'espèce actuelle il n'y a pas même plusieurs droits d'actions distinctes. La plainte faite dans le district de Montréal, l'arrestation dans le district d'Iberville et les bruits injurieux qui ont été la suite de la plainte et de l'arrestation ne forment qu'un seul droit d'action. Les dommages qui en sont résultés ne sont que la conséquence d'une même transaction. Le demandeur pourrait tout aussi bien prendre autant d'actions de dommages qu'il y a de personnes qui ont eu connaissance de la plainte, ou de l'arrestation, que de vouloir faire résulter une action de la plainte, une action de l'arrestation et une action des bruits que ces procédés ont fait répandre dans les districts de Montréal, d'Iberville et de Bedford.

A. Archambault & N. Bolduc.

Nous croyons que l'exception déclinatoire était bien fondée et que l'appel doit être accordé.

Motion accordée.

MM. Archambault & David, pour le demandeur.

S. Pagnuelo, C. R., pour le défendeur.

MONTREAL, 29TH NOVEMBER, 1881.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 248.

HENRY NELSON WHITMAN,

Plaintiff in the Conrt below,

APPELLANT,

AND

THE CORPORATION OF THE TOWNSHIP OF STANBRIDGE,

Defendants in the Court below,

RESPONDENTS.

(*Mr Justicc Ramsay dissenting.*)

HELD :—1st That under art. 774, of the Municipal Code, the fences which separate any front road from any land are at the costs and charges of the owner or occupant of such land, when the same are necessary, and this rule extends to front roads where the work is executed by the corporations under art. 108'.

2nd That this rule applies to roads which have been opened since the Code came into force, as well as to those then existing.

CROSS, J.—The Appellant Whitman, an owner of real estate in the township of Stanbridge, brought an action against the municipality of the township, for having in or about the month of june 1875, opened a front road across his farm lot No. 4 in the first range of Stanbridge, the property of the Plaintiff, traversing the lots numbers, from 4 to 8 inclusive in that range, and tearing down his fences to open said road, thereby leaving his fields and crops open to the ravages of animals which caused him great damage; and for having refused to fence said road.

He alleges a protest made by him on the 21st june 1876, requiring the municipality to fence the road within five days, failing which he would do so at their expense, and

would claim the cost thereof together with the damages suffered by him. He further alleges that his land continued so exposed until the first of august, when he himself made the fences, he consequently claims $195 for the cost of fences, protest and damages.

A demurrer was first pleaded to the action and was sustained by the Superior Court, but the Queen's Bench reversed the judgment and held the declaration sufficient.

The second plea, averred that the establishment of the front road was within the authority and the duty of the municipality, that it was done with reasonable care, and was a benefit, not a damage, to Whitman.

It appears by the proof, that the municipal council of the township of Stanbridge, ordered the opening of the front road in question, which crossed a corner of Whitman's land, for a distance of sixty rods, passing through a field where he pastured thirty cows. His fences were thrown down both where the road entered, and where it passed out of his field, and in order to use his field on both sides of the road, Whitman was afterwards obliged to fence it. He erected a board fence, the cost of which he charges to the municipality. The damages complained of do not appear to have been occasioned by cattle trespassing on Whitman, but are charges for the care and keeping in of Whitman's own cattle, while the openings existed, to allow the front road to pass into and out of his field, before the road itself was fenced. Odell, the inspector under whose direction the road was opened, examined as a witness for Whitman, says that every night during the work the fences were put up, that one morning they were found down altho put up the previous evening and the cattle, that is Whitman's cattle had got into the neighbor Monaghan's hay, and that the damage caused could not have been but nominal. Other witnesses state in a general way that the cattte got out and caused damage and trouble to look after them and keep them in, which they say they would not have the trouble of for $25.00. A witness named Wightman proves that he was allowed $167 for making the fences.

We are referred to art. 774 of the Municipal Code which reads as follows;

H. N. Whitman & The Corporation of the Township of Stanbridge.

"The fences which separate any front road from any land "are at the costs and charges of the owner or occupant of "such land, when the same are necessary."

As every proprietor is bound to have one front road, and it does not appear that there is a second on Whitman's land, this would seem to make it clear that he was bound to make the fences himself, and can have no damages either for being obliged to make them, or for what was caused by their absence.

The Appellant contended that this rule only applied to roads existing at the time the code came into force and was not retroactive in its effect, on the contrary I think it was declaratory of a long existing established rule of law and the general practice prevailing throughout the province, besides, the article in question is general in its application.

It is, however, argued that the present case is within the exception contained in art. 1080, by which all works on municipal roads and bridges within the localities therein described are executed at the expense of the corporation.

Doubtless the township of Stanbridge is within the territories thereby excepted, but it does not follow that more than road work consequently falls to be performed by the municipality.

It is contended that the fences enclosing a road are part of the road as much as are the ditches on each side of it. In the Con. Stat. for Lower Canada, Cap. 24, s. 40, § 13, it is declared that the ditches shall be held to be part of the road. If special legislation were necessary to make the ditches part of the road, I should think it would be much more so in regard to the fences. It is true that the fencing of one side of a by-road is partitioned among the inhabitants of the concession who have to make and keep up the by-road, but such by-roads are on a wholly different footing from front roads.

The proprietor who is invaded by a by-road, should not be thereby obliged merely for the advantage of his neighbors to keep up two fences in place one the whole length of his farm, on the other hand, a front road is absolutely necessary for him, and the keeping up of the fences is a consequence of its proximity, and for his own special benefit.

I think the practice has been to have the fences enclosing front roads maintained by the proprietors adjoining these roads, a practice that would seem to be the most convenient and the most economical.

H. N. Withman & The Corporation of the Township of Stanbridge.

Judgment confirmed.

Carter, *Church*, *Chapleau*, *Carter & Busteed*, for Appellant.

Jos. O'Halloran, for Respondents.

MONTRÉAL, 11 DÉCEMBRE, 1881.

Coram MONK, RAMSAY, TESSIER, CROSS et BABY, Juges.

No. 173.

BENJAMIN DAWSON & AL, *ès-qualité*,

Défendeurs en Cour Inférieure,

APPELANTS,

ET

HENRI RODOLPHE S. TRESTLER,

Demandeur en Cour Inférieure,

INTIMÉ.

JUGÉ, (MONK ET RAMSAY, juges, *dissentientibus*)—Que les Appelants, propriétaires d'une église dont le toit est construit de manière à laisser tomber dans la rue la neige qui s'y est accumulée, sont responsables des accidents causés par la chute de cette neige, quand ils n'ont pas prouvé force majeure.

CROSS, J.—This action was instituted on the 24th march 1879, by Henri R. S. Trestler, against the Trustees of St. Bartholomew's church, claiming from them $1,000. Damages, for personal injuries which Trestler had sustained by a collision which occured between four and five o'clock in the afternoon of the 4th January 1879, on Beaver Hall Hill, in the city of Montreal, between a carter's sleigh in which Trestler and three friends were passengers, and a sleigh belonging to Mr Andrew Robertson, driven by his coachman Wm. Dare; the carter's sleigh having been run into by that driven by Dare, and Trestler seriously hurt, which caused him to be laid up for considerable time, and to incur considerable expense, for medical attendance and otherwise, the direct and

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immediate cause of the damage being as alleged in the declaration, an avalanche of snow, which fell from the roof of St. Bartholomew's church, which so frightened Mr Robertson's horse that the coachman entirely lost control over him, the consequence of which was, his rushing headlong into the sleigh containing Trestler and his friends, and seriously injuring Trestler.

The case turned entirely upon the question as to whether the Defendants now Appellants were chargeable with negligence or fault, so as to render them responsible.

By the judgment of the Superior Court rendered on the 6th october 1879, Trestler's action was dismissed, but by judgment in review rendered on the 28th of february 1880, the first judgment was set aside, and Trestler's action maintained for the sum of $150 for which he had judgment with costs.

The Trustees bring the present appeal, complaining of this judgment.

The facts disclosed by the evidence are as follows:

St. Bartholomew's church is situate in the southern angle of Radegonde and Palace streets, on Beaver Hall Hill. It has its main entrance at the end facing Palace street, and extends lengthways down the hill along Radegonde street, at a distance from it of about between four and five feet, and is enclosed with a board fence. At the lower end, there is a side entrance to the basement under the church, the floor of which is here on a level with the street, while at the upper end, the main entrance to the church is on the level which the church has attained by the rising of the hill, and is consequently one story higher, than the side entrance. At the upper corner, the fence tends inwards cutting off the angle that would be formed by its continuance in a straight line to the line of Palace street; thus rounding off the corner, and bringing the upper end of the church nearer to the actual line of Radegonde street; consequently snow falling from the roof at this point, would project further into the street than at the lower end, and would also have less distance to fall.

Between four and five o'clock in the afternoon of the 4th of january 1879, Trestler, the respondent, with three

friends besides the driver, were proceeding at a lesurely pace up Beaver Hall Hill near St. Bartholomew's church in a hired sleigh, and had attained a position near about opposite to the lower end of the church. A sleigh and horse belonging to Mr Andrew Robertson driven by a coachman named William Dare, was at the same time coming down the hill; when opposite, to and near the upper end of the church, a considerable avalanche of snow fell from the roof and striking the horse, sleigh and coachman, blinded the man and caused the horse to take fright, the coachman losing control the horse dashed down the hill, and coming violently in contact with the sleigh which contained Trestler and his friends, Trestler was thown out and trampled upon, sustaining such serious injury that he was a long time laid up under a doctor's care, iucurred considerable expense and underwent great suffering.

For the Appellants it is contended that no negligence on their part has been proved, that it is not shewn they allowed snow to accumulate on the roof without exercising sufficient deligence in its removal; that it has not in fact been proved that the accident was caused by the falling of snow from the roof; that the roof was constructed with a steep pitch in the special view of preventing snow from lodging on it; that it could not hold snow and it was impossible the accident could have been the result of the cause assigned, and finally that they the Appellants are not in law liable for damages resulting from such a cause.

Some evidence has been adduced on the part of the Appellants by persons to whom the church was well known, to the effect that they never saw any considerable quantity of snow lodge on the roof, none in fact beyond a few shovelsfull at the north or upper end, and that the roof was so constructed that it would not hold snow; but the fact of the snow being there on the occasion in question, and having been the cause of the accident in question, is sworn to in a very distinct and positive manner, by a number of witnesses.

Besides the vehicle driven by Dare, another sleigh viz, that of Carsley, the Haberdasher, was at the same time coming down the hill, and its occupants Johnson and Donahue,

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both saw the collision, and the manner in which it was brought about.

Globensky, Pelletier and Larocque who were in the vehicle with Trestler, Wm. Dare, Mr. Robertson's coachman, Johnson and Donahue, the drivers of Carsley's delivery cart, all tell the same story. The sleigh in which Trestler was, was going up the hill, the others were coming down, they observed a considerable avalanche of snow fall from the roof of the church, enveloping Mr. Robertson's horse, sleigh and driver, the horse took fright, rushed down the hill, ran into the sleigh containing Trestler and his friends, causing to Trestler the injury which he complains of. Johnson being cross examined as to the possibility of snow coming off the roof of the church and reaching Mr Robertson's horse and sleigh answers, "it must have been possible if it did it," and this after having sworn to seeing it occur.

Joseph Mitchell, the sexton and caretaker examined for the Appellants, does not condracdict the story of the above mentioned witnesses. He came out of the basement at the lower end of the church, just as the collision took place a little lower down on the opposite side of the street, consequently after the avalanche had fallen, and after Robertson's horse had started off with the fright; when asked. "Do you swear that when the horse was coming down Beaver Hall Hill there was no snow going off from the roof of St. Bartholomew church which fell on that horse and which frightened the horse?" He answers among other remarks: "No, none "that I saw, the horse so far as I know might have got frigh- "tened further up the hill."

On these facts the fault on the part of the Appellants may be very slight indeed, but there is fault, and the law holds a party in fault to a very rigourous responsibility. Art. 539 of the Civil Code declares that "roofs must be constructed in "such a manner that the rain and snow from off them, may "fall upon the land of the proprietor, without his having the "right to make it fall upon the land of his neighbor."

Besides the evidence already alluded to, Mr McLeod, superintendent of the McGill college observatoay was examined, and produced a table of the meteorological records of the

2nd, 3rd and 4th of january 1879. He establishes that a considerable fall of snow occured on the 2nd, but that from two o'clock in the afternoon of the 3rd to five o'clock in the afternoon of the 4th, there was no appreciable fall of snow. Corporation by law, sec. 21, is also produced, which requires that snow or ice accumulated on the roofs should be removed or thown down by the persons having the charge of the houses or buildings, and that before nine o'clock in the morning. It was thus established that it was the duty of the church trustees to have the snow removed from the roof of the church which must have accumulated on the 2nd or the 3rd at the latest, before 9 o'clock in the morning of the 4th, and their failure to do so, shews that fault is attributable to them, and however slight it may be, it is sufficient to involve responsibility for its consequences. Doubtless the injury that it caused in this instance was one extremely unlikely to happen, on account of the special construction of the roof, it might never in all probability occur again, it is one in which most proprietors would perhaps run the risk of, still that risk is on the proprietor, and his is the responsibility.

Art. 1053 of our Civil Code corresponding with art. 1382 of the Code Napoléon, says "every person capable of discern-" ing right from wrong is responsible for the damage caused " by his fault to another, whether by positive act, imprudence, " neglect or want of skill." Every day we have examples of persons held to responsibility while unconscious of any act of wrong doing, yet held for what is construed to be legal fault; and in this connection it may be observed, that altho persons are entitled to the free and unrestricted use of their properties, yet if in exercising that use, they divert the elements from their natural course so as to be calculated to cause injury, they must for the protection of others, provide against such possibility of injury.

As regards the rigourous nature of the legal responsibility I may be allowed one or two citations. Dalloz, Dic. de jurisprudence, *verbo responsabilité*, t. 4, p. 225, no. 33. "L'homme " est responsable de tout dommage causé par son fait cette " expression fort étendue conprend jusqu'aux réticences nui-" sibles à autrui et l'omission d'empêcher un mal que l'on " pouvait prévenir." No. 38. "Les articles 1382 et 1383 ne

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" dispensent pas de réparer le dommage, celui même qui n'a " commis qu'une faute légère, qui a failli par ignorance, par " faiblesse, ses torts ne doivent pas nuire à celui qui a souf- " fert. On doit même la réparation du dommage causé par " un fait innocent qui n'a occasionné le préjudice que par ses " suites imprévues, si l'on néglige de prendre les précautions " pour les prévenir."

From these observations it follows that the judgment of the Court of Review granting dammages to the Respondent for the injuries he has complained of, should be confirmed. At least the majority of the Court are of opinion to confirm that judgment. The appeal is consequently dismissed with costs.

Jugement confirmé.

Kerr & Carter, pour les Appelants.

Geoffrion, Rinfret, Dorion & Laviolette, pour l'Intimé.

MONTREAL, 22nd NOVEMBER 1881.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 175.

AMBROISE SENÉCAL,

Opposant in the Court below,

APPELLANT;

&

ALEXANDER CRAWFORD,

Plaintiff in the Court below,

RESPONDENT.

HELD :—Reversing the judgment of the Superior Court. Mr. justice Cross dissenting, 1o. that although the goods and effects sold at a judicial sale remain after the sale in the possession of the defendant, with the consent of the purchaser, such purchaser or his representatives may, in the absence of fraud, prevent the sale of the same goods at the suit of another of the defendant's creditors. 2o. that in the present case, there is no evidence of fraud in the judicial sales made on the defendant and that the appellant has established by legal evidence that he is the representative of the purchaser, at such judicial sales of the goods and effects seized at the suit of the respondent and as such he is entitled to *main-levée* of said seizure.

CROSS, J.—The judgment appealed from was rendered in the Superior Court at St. Hyacinthe on the 12th of March 1880, on the contestation of an opposition *afin de distraire* fyled by the appellant Ambroise Senécal, and contested by the respondent Alexander Crawford; by which judgment the Court sustained the contestation and dismissed the opposition. The effects claimed by the opposant had been, with some others, seized under an execution issued by Crawford as plaintiff, against Louis A. Senécal, defendant. The grounds on which the Superior Court dismissed the opposition were the following:

First. That the opposant had never had the possession of the effects seized, nor had he ever intended to acquire or possess them.

2nd. That the opposant was without pecuniary resources and never had had the means of acquiring the effects in question, but simulated their purchase, to be effective only if the Defendant should furnish him with the money to pay for them.

3rd. That the opposant was merely an interposed person, to enable the Defendant, his brother, to screen his effects from the proceedings of his creditors against him.

A. Senécal & A. Crawford.

The property seized was of considerable value, and the bulk of it was claimed by the opposant.

The proof consisted of but two depositions, viz: that of Miss Malvina Tétrault, an inmate of the defendant's house, and of judge, the Hon. Charles Gill, defendant's son in law.

Miss Tétrault stated generally that in the course of the year 1877, the effects claimed by the opposition had been adjudged on different occasions at judicial sales of the defendant's goods, to judge Gill, in accordance with three *procès verbaux* of sales copies whereof were produced at the *enquéte* with her deposition.

Judge Gill examined by commission rogatoire, states that the opposant is the brother of the defendant and that he himself is defendant's son in law; that he judge Gill became *adjucicataire* of the effects specified in the three *procès verbaux* already referred to, and paid for them with his own money, in which effects were included, those claimed by the opposition; that he afterwards on the 27th November 1870, disposed of them to the opposant, for $2562, receiving for them five promissory notes, payable respectively at three, six, nine, twelve and fifteen months, whereof he had transferred the three first to the agency of the Merchants' Bank at Sorel, the two last then not yet due he had retained; none of these notes including those overdue had been paid by the opposant; that he never had had actual possession of the effects claimed; that when he sold them to the opposant they were packed and addressed to him at Montreal, to be transported there by rail, but to be delivered to the defendant at Montreal; his object in purchasing them was to do the defendant a service, he had consequently left them in defendant's possession, and in selling to the opposant, he knew that the opposant would leave them in Defendant's possession, else he would not have sold them to the opposant. A writing *sous seing privé* was made of the sale, the defendant was insolvent, and when the opposant purchased, he himself had just had his discharge through the Insolvent Court,

On these facts, I do not think the judgment of the Superior Court ought to be disturbed. Admitting that the sales to judge Gill *par decret* were valid, and that he might in this manner legally interpose to assist his father in law, by pur-

chasing the effects and leaving them in his possession, yet this did not dispense his alleged vendee, from proving by legal testimony that they belonged to him, in order to sustain his opposition to withdraw them from the seizure, which I think he has failed to do.

First. The sale by judge Gill to the opposant was not followed by any displacement or delivery of the effects so as to put them into the actual possession of the opposant. The transaction was not a commercial one, and in any case not proveable by verbal testimony without a delivery or a writing.

Second. It is proved that in this case there was a writing, which however has not been produced; the best evidence of the opposant's title was consequently not offered, *non constat* but that the writing would have shewn a defect in opposants title, or that it was a pure fraud, or that the property in question was liable to seizure, in consequence of some condition that made it vest in the defendant, or for any other cause that might be explained. From the fact of the non production by the opposant of his title, it is presumable that it would have made proof against him.

Third. From the length of time the effects had been allowed to remain in defendant's possession without the exercise of any rights of ownership over them by judge Gill, it may be inferred that he was unwilling himself to interfere to claim property which probably cost him very little, and which he had abandoned to the defendant for whom he originally purchased it, and from which he was deriving no benefit; thus transfering to the defendant as well the advantage of proprietorship, as the trouble and cost of guardianship and protection of the property with which he intended no longer to charge himself.

Fourth. It was a family matter, arranged among relations. The opposant as well as the defendant were without means. Supposing a form of sale to the opposant had been gone through, yet he had paid nothing on the promissory notes alleged to have been given by him although most of them were over due. It is not unreasonable to infer that the arrangement was to protect the effects against the defendant's creditors, until it was convenient and within the power of the defendant to pay for them, if payment was at all expected.

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Fifth. The plaintiff's seizure took the effects in defendant's possession, whereby defendant's presumed proprietorship was placed *en mains de justice*, taking priority over any transaction that required a delivery for its completion, and holding the property as against all who failed to claim, or who having claimed, failed to prove title by legal and sufficient evidence.

The title which the opposant seeks to avail himself of, is not so much his own title, as that of his brother in law judge Gill, and even judge Gill's title requires his own evidence to support it, which would not have been received had he himself been opposant, and ought not now to be deemed of any more force in support of that title for the opposant; consequently the argument used that it has been proved that the goods in question do not belong to the defendant, loses its force. In so far as the opposant relies upon his own purchase from judge Gill, for the reason already explained, he has failed to make any legal proof; and as to the proof adduced not having been objected to, I am not aware that it has ever been ruled here, that the failure of such objection precluded the judge from refusing to give effect to such evidence when the case came to be decided on its merits, I think the practice has been to disregard such evidence.

Suppose the evidence admissable and valid, yet in cases very similar, such transactions have been held to be simulated. The present has a strong resemblance to that of *Dubois vs. Ryan*, decided by this Court in 1862 and reported, 13 L. C. R. p. 21, and that of *Brough vs. McDonell*, decided by this Court in 1865, reported in 15, L. C. R., p. 492. For these reasons I would be disposed to confirm the judgment of the Superior Court.

Dorion, C. J.—The only question in this case is whether the appellant was the owner of the chattel property which he claims by his opposition, at the time they were seized at the suit of the respondent?

It is proved beyond doubt that the goods and effects claimed were sold to the present Mr. justice Gill, at public sale, under several writs of execution. The *procès verbal* of these sales, with the receipts for the price paid are produced, and the articles are identified by a witness who lived with the defen-

dant when the sales took places. If this was the sole evidence, it would show that judge Gill is the owner of the goods seized and not the defendant. The only additional evidence required to complete the title of the appellant is that which will establish his right not against the defendant, nor against the respondent, his creditor, for it is proved they have no right to the goods, but as against judge Gill, who is proved to have purchased them at severa judicial sales. To prove this, judge Gill was examined as a witness and he admits that he sold the goods to the appellant for value received by his several promissory notes, before the seizure made in this case. The appellant has therefore proved by the best possible evidence that the defendant has been divested of the property of these goods by judicial sales, and that by such sales they have become the property of judge Gill, and he proves by judge Gill, himself, that he has ceased to be the owner of these goods when he sold them to the appellant.

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But is has been contended that the notes which the appellant has given for these goods have not been paid and that the appellant should have produced a written sale from judge Gill to him. If judge Gill, was, as it is proved, the owner of the goods, he might have given them to the appellant for nothing, if he had thought proper to do so, and therefore it can be no objection to the title of the appellant that judge Gill has not exacted payment of the notes which the appellant has given him. Neither the defendant, nor the respondent have any interest in this transaction between judge Gill and the appellant.

As to the pretension that the sale by judge Gill to the appellant should have been established by a deed in writing, it is without any foundation. It was necessary to prove by writing that Senécal had ceased to be the owner of the goods seized, but as between judge Gill and the appellant judge Gill's declaration, under oath, that he has parted with the goods and disposed of them in favor of the Appellant is equal to any similar declaration which he might have made either before a notary or in writing *sous seing privé*. The writing would only be required if the defendant or the respondent had produced a title and claimed to hold these goods from judge Gill himself, but no such contention has been raised in this case.

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It is also worthy of remark, that the respondent has consented to the examination of judge Gill and that he has not examined a single witness. There is not therefore the slightest suspicion of fraud in the transaction. It is quite true that judge Gill bought these goods with the object of allowing the defendant to have the use of them, and that he either stipulated or expects that the appellant will do the same, but judge Gill or the appellant might have given the goods to the defendant subject to the condition that they would not be seized by his creditors, and there can be no objection to their leaving him the use of their goods subject to their being returned whenever they claimed them. The creditors have no right to prevent a friend or a relative of the defendant from assisting him. They are only interested in preventing their debtors from entering into fraudulent or simulated transactions to their prejudice, and there is here no evidence of such transactions.

The judgment must therefore be reversed and *main levée* given to the appellant of the seizure as to the goods and effects claimed by his opposition.

Judgment reversed.

Lacoste, Globensky & Bisaillon, attorneys for appellant.
T. Bertrand, attorney for respondent.

MONTRÉAL, 24 NOVEMBRE et 11 DÉCEMBRE 1880.

Coram DORION, J. C., MONK, RAMSAY, CROSS, BABY, J. J.

No. 384.

MARIE CLÉMENTINE D. HOTTE,

APPELANTE ;

ET

FRANÇOIS AUDEGRAVE DIT CHAMPAGNE,

INTIMÉ.

JUGÉ :—Que la Cour du Banc de la Reine peut ordonner qu'une enquête ait lieu devant la Cour, lorsque cela est nécessaire pour la décision d'incidents survenus depuis l'appel ou depuis le jugement qui y a donné lieu.

DORION, Juge en Chef.—L'Intimé demande le renvoi de l'appel en alléguant que l'Appelante a acquiescé au jugement de la Cour de Première Instance.

Il produit au soutien de sa requête deux affidavits et un acte authentique, auquel il prétend que l'Appelante a acquiescé, quoiqu'elle n'y ait pas été partie.

L'Appelante a produit trois affidavits pour contredire ceux produits par l'Intimé.

L'Intimé a, en outre, produit l'affidavit de son procureur dans lequel celui-ci déclare qu'il croit que, s'il avait l'occasion de transquestionner les personnes qui ont donné les affidavits produits par l'Appelante, il pourrait faire expliquer ces affidavits et établir par elles l'acquiescement.

Les affidavits de part et d'autre sont très contradictoires, et quoiqu'il soit très incommode de faire une enquête devant cette Cour, cela a déjà été ordonné dans plusieurs causes et, entr'autres, dans celle de McKillip et Kauntz et al, 1 Revue de Législation, 152, sur une demande en Reprise d'Instance, dans celle des Curé et Marguilliers de Varennes et l'Evêque de Montréal, 4, Revue Légale, 127, sur une demande en désaveu, et enfin dans la cause de Jordan et al et Jetté et al, le 27 juin 1876, sur une question d'acquiescement.

Ordonné : que les personnes qui ont fourni les affidavits produits par l'Appelante, comparaissent le 11 décembre prochain, pour être examinées devant cette Cour.

Après l'enquête les parties ont été entendues et la requête renvoyée, les allégués n'en étant pas prouvés.

Sur la question d'acquiescement les parties ont cité les autorités mentionnées dans l'ouvrage de Mr Doutre, sur la procédure, t. 2, p. 461.

Prévost et Prefontaine, pour l'Appelante.
Ouimet et Ouimet. pour l'Intimé.

MONTRÉAL, 24 NOVEMBRE, 1880.

Coram DORION, J. C., MONK, RAMSAY, CROSS, BABY. J. J.

No. 266.

THE CANADA INVESTMENT AND AGENCY COMPANY,

APPELANT ;

ET

JOSEPH HUDON,

INTIMÉ.

JUGÉ :—1o. Qu'un bref d'appel n'est pas nul quoiqu'il n'ait pas été signé par les procureurs de l'Appelant ;

2o. Qu'un cautionnement donné un autre jour que celui pour lequel l'avis a été donné, ne sera pas rejeté si la partie n'a pas souffert de l'irrégularité et ne se plaint pas de l'insolvabilité des cautions.

DORION, Juge en Chef.—L'Intimé demande le rejet de l'appel : 1o. parceque le writ d'appel n'a pas été signé par les procureurs de l'Appelant.

2o. parce que le cautionnement a été donné le 26 octobre 1880, et que l'avis donné à l'Intimé était pour le 27 octobre.

Sur le 1er point il a déjà été jugé dans la cause de Viger et Béliveau, 12 L. C. Rep., p. 405, que, nonobstant la règle de pratique qui exige que le writ d'appel soit signé par les procureurs de l'Appelant, l'omission de cette signature n'entrainait pas la nullité du bref d'appel, et dans la pratique le bref d'appel n'est jamais signé par les procureurs.

Quant à la seconde question, il n'y a pas de doute que le cautionnement a été donné d'une manière irrégulière et sans avis suffisant ; mais l'Intimé souffre-t-il de cette irrégularité ? Tout ce dont il pourrait se plaindre ça serait de l'insuffisance du cautionnement, et il ne suggère pas même qu'ici, les cautions soient insuffisantes.

Dans les causes de Brooke et Dallimore, 20 Jurist, 176, de Lenoir et Mallette, 21 Jurist, 84, et de Gibb et The Beacon Fire Insurance Company, cette Cour a renvoyé de semblables motions, en réservant aux Intimés de contester la suffisance du cautionnement.

Dans cette cause-ci, nous ferons plus et nous continuons la motion au 11 décembre prochain, pour donner à l'Intimé l'occasion de contester la suffisance des cautions. S'il ne conteste pas, il pourra retirer sa motion sans frais, et s'il conteste, les frais devront suivre le sort de la contestation.

Abbott, Tait, Wotherspoon et Abbott, pour l'Appelant.
Perras, pour l'Intimé.

MONTRÉAL, 17 SEPTEMBRE, 1880.

Coram DORION, J. C., MONK, RAMSAY, TESSIER, CROSS, J. J.

No. 5.

JOSEPH LÉVEILLÉ,

Demandeur en Cour de Première Instance,

APPELANT ;

ET

JOSEPH DAIGLE,

Défendeur en Cour de Première Instance,

INTIMÉ.

JUGÉ :—Que quoique la règle générale est que les endosseurs d'un instrument négociable sont responsables suivant la date de leur endossement, cette règle n'est pas nécessairement invariable, et que l'on peut prouver par les voies ordinaires, que l'ordre dans lequel les endossements ont été obtenus a été interverti par erreur, ou que l'entente était, entre les endosseurs, que leur responsabilité ne devait pas suivre l'ordre de leur endossement.

Le 12 mai 1877, McLeod, McNaughton et Léveillé ont fait leur billet à trois mois, à l'ordre de l'Appelant, pour la somme de $1200. Ce billet a été endossé dans l'ordre suivant : 1o. par Joseph Daigle, l'intimé, puis, par Pierre Daigle, et en troisième lieu, par l'Appelant.

L'Appelant allègue, dans sa déclaration, que l'Intimé a endossé ce billet pour aval, comme garant des tireurs McLeod, McNaughton et Léveillé, et qu'après l'échéance du billet, il en a payé le montant, et il demande que l'Intimé soit condamné à lui rembourser ce qu'il a payé.

L'Intimé a plaidé que ce billet avait été donné pour en renouveler un autre du même montant, endossé d'abord par l'Appelant, à l'ordre de qui il était fait, et ensuite par l'Intimé, et par son frère, Pierre Daigle ; que résidant à la campagne, le billet lui avait été envoyé de Montréal, pour qu'il l'endossât, ce qu'il avait fait avant que l'Appelant ne l'eût endossé et qu'il l'avait renvoyé avec son endossement, sous la conviction que l'Appelant mettrait son nom avant le sien, comme il l'était sur le billet qu'il s'agissait de renouveler, et qu'au lieu de mettre son nom au-dessus du sien il l'avait mis au-dessous, contrairement à l'entente existant entr'eux, et que, sous ces circonstances, il n'était pas tenu au paiement du billet.

La Cour de Première Instance a renvoyé l'exception de l'Intimé et l'a condamné à payer le montant du billet. Ce jugement a été infirmé par la Cour de révision.

Joseph Léveillé & Joseph Daigle

DORION, Juge en Chef.—Il est prouvé que le billet dont l'Appelant réclame le montant a été endossé pour renouveler un autre billet qui était endossé par les mêmes parties, mais avec cette différence que l'Appelant, à l'ordre de qui le billet était fait, était le premier endosseur. Ces billets n'ont été endossés que par complaisance, tant de la part de l'Appelant que par l'Intimé. L'Appelant, qui est le père de l'un des membres de la raison sociale de McLeod, McNaughton et Léveillé, ne donne aucune raison pourquoi l'on aurait changé l'ordre des endossements sur le dernier billet, et pourquoi Daigle serait devenu le premier endosseur d'un billet qui n'était pas fait à son ordre, surtout lorsqu'il n'était que second endosseur sur le billet qu'il s'agissait de renouveler.

Voici ce que l'on trouve dans Daniel, on Neg. Sec., No. 704, p. 520 :

" The endorser is not necessarily bound according to the " date of the indorsation, but according to the contract; and " if it appears that the instrument was indorsed by one party " with the agreement that another should become prior in- " dorser, the latter will be held responsible first in point of " contract, though second in point of time."

" When a note is endorsed by the payee and by a third party, " the legal inference is that the payee is prior endorser, but " it may be proved otherwise by parol evidence ; and if there " be any mistake by which one endorser signs before another, " the true intention of the parties may, as between them- " selves, be shown by parol evidence and corrected in equity, " or in a suit against the endorser who appears prior, he may " show that he signed above the second endorser uninten- " tionally and if he has paid part of the amount to the holder, " he may recover it back from the endorser apparently second, but really prior."

Cette doctrine est si raisonable que, sous les circonstances de cette cause, nous n'avons aucun doute que le jugement de la Cour de Révision doit être confirmé.

Un jugement semblable a été rendu par cette Cour en 1861, dans une cause de Day et Sculthorpe. (11, L. C. Rep., 269.)

Jugement confirmé.

L. O. Taillon, C. R., pour l'Appelant.

Geoffrion, Rinfret, Dorion et Laviolette, pour l'Intimé.

MONTREAL. 23RD SEPTEMBER, 1881.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, J. J.

No. 34.

RICHARD WILSON,

APPELLANT.

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.(1)

RESPONDENTS.

The Appellant obtained a verdict in his favor from the jury, in the Superior Court, for injuries sustained by being run over on the 21st November 1876, by a locomotive engine of the Respondents, while he was crossing their railway track, on a public highway, at St. Johns.

On a motion for new trial, held, by the Court of Queen's Bench, reversing the judgment of the Court of Review, Cross and Baby, J. J., dissenting.

That from the evidence in the record, it appears that the accident occurred through the gross negligence of the employees of the Respondents in not ringing the bell and sounding the whistle, as they were bound to do, when approaching the crossing, and that the verdict rendered by the jury ought therefore to be maintained and the motion for new trial rejected.

DORION, C. J.—This is an appeal from a judgment rendered by the Court of Review on a motion for new trial.

The Appellant by his action claimed $6,000 damages, for injuries sustained by being run over, on the 21st of November 1876, by a locomotive engine of the Respondents, while he was crossing their railway track, on a public highway, at St. John's.

It is specially alleged in the declaration, that the accident occurred through the fault and negligence of the employees of the Respondents in charge of the locomotive and that they did not ring the bell, nor sound the whistle, nor give any other warning at a place, where the Respondents had neglected to protect the crossing by gates or fences.

The Respondents, by their several pleas have denied the allegations of the Appellant, and have specially alleged that the Appellant was struck when he was a trespasser on their road, and not when he was on a public railway crossing, and that the injury was due to his own negligence and carelessness.

A number of questions were submitted to the jury, and to the following the answers thereto appended were returned.

Second question.—Was the Plaintiff in this cause on that day, in the service of the government of this Dominion, in

(1) This case is now before the Supreme Court.

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the capacity of Customs officer, and as such was he obliged and had he occasion to pass and repass over and across the said line of Railway at and near the depot of station of the said Company, Defendants, at St. Johns aforesaid?

Answer.—Plaintiff was employed by the Dominion Government, as Custom Officer, and as such had occasion to cross said railway track. (Signed), Chs. J. Marchand, foreman for all the Jurors.

Third question.—Was the Plaintiff in this cause on the said twenty-first day of November, one thousand eight hundred and seventy-six, while in the actual discharge of his duties as such Custom House officer, and while crossing the Defendants' line or Branch of Railway on the public crossing thereof at St. Johns aforesaid, struck and knocked down by a locomotive engine driven and propelled by the engineer, employees and servants of the Defendants engaged in running the said locomotive by passing over his left arm destroying and fracturing the same,as to render amputation necessary?

Answer.—Yes. (Signed), Chs. J. Marchand, foreman for all the Jurors.

Fourth question.—Was the said locomotive driven and propelled against said Plaintiff from behind, that is when Plaintiff's back was turned, and while proceeding thus in a direction so as to prevent his seeing the approach of the said engine?

Answer.—Yes. (Signed), Chs. J. Marchand, foreman and for ten Jurors.

Fifth question.—Did the engineer, employees and servants of the Defendants so engaged in running the said locomotive, on the said twenty-first day of November eighteen hundred and seventy-six, over the said line of railway, and while the same was crossing and passing along the said public highway, give due warning or notice of danger by ringing the bell or sounding the whistle of the said locomotive, or both: and was the said locomotive at the time running very slowly?

Answer.—No: Sufficient warning was not given; but the locomotive was running sufficiently slow. (Signed), Chs. J. Marchand, foreman for all the Jurors.

Sixth question.—Did the Plaintiff receive the injuries complained of by him while he was crossing the line of Defendants' said railway on said last mentioned day, at a part of

said line of railway where the same intersects the public highway in the said town of St. Johns and where there is a public highway crossing across Defendants' said line of railway?

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Answer.—Yes. (Signed), Chs. J. Marchand, foreman for ten Jurors.

Ninth question.—Was the Plaintiff on the said twenty-first day of November, one thousand eight hundred and seventy-six, and when the said accident occurred, unlawfully trepassing upon and walking along and across the said railway track, at a place where there was not, and is not any public highway crossing of the railway and where the said track was not and is not laid across a highway?

Answer.—No: He was not trespassing, being there on official duty. (Signed), Chs. J. Marchand, foreman for eleven Jurors.

Tenth question.—Was the Plaintiff on the said twenty-first day of November eighteen hundred and seventy-six, on the occasion of the alleged accident, carelessly, negligently and unlawfully walking along and across and standing upon the said railway track, along and upon which the said locomotive was then moving and whilst it was approaching towards him and finally struck him?

Answer. — No. (Signed), Chs. J. Marchand, foreman for eleven Jurors.

Eleventh question.—Was any such injury (as alleged by the Plaintiff to have been sustained and suffered by him) caused by or through any fault, carelessness or negligence on the part of any of the Defendants' servants whilst in charge of and running or operating the Defendants' locomotive upon and over the Defendants' railway?

Answer.—Yes: By Defendant's carelessness and negligence. (Signed), Chs. J. Marchand, foreman for all the Jurors.

Twelfth question.—Was the alleged accident to Plaintiff and such injury as he may have suffered in consequence thereof caused by the fault or carelessness or negligence of the Plaintiff himself?

Answer.—No. (Signed), Chs. J. Marchand, foreman for eleven Jurors.

Thirteenth question.—Did the Plaintiff by his own fault,

carelessness or negligence, contribute to the said accident and injury to himself?

Answer.—No. (Signed), Chs. J. Marchand, foreman for eleven Jurors.

Fourteenth question.—Was the Plaintiff on the said day greatly injured by the said locomotive, and was the amputation of his left arm thereby rendered necessary, and was he thereby injured in his health and prevented from attending to business for a long space of time; and did he otherwise sustain loss and damage by reason thereof?

Answer.—Yes: To each of these four questions. (Signed), Chs. J. Marchand, foreman for all the Jurors.

Fifteenth question—Has the Plaintiff through the fault of the Defendants in the premises, sustained damages? and if so to what amount?

Answer.—Yes: Plaintiff has suffered damage through the fault of the Defendants; and we estimate said damages to five thousand dollars currency. (Signed), Chs. J. Marchand, foreman for all the Jurors.

The verdict being in favor of the Appellant, the Respondents moved for a new trial on grounds specially set forth in the motion.

The Court of Review granted the motion for the 2nd, 4th, 6th, 13th, 15th, 17th and 18th reasons assigned by the Respondents, and ordered a new trial.

By the second and fourth grounds alleged in their motion, the Respondents complain that the judge presiding at the trial, has misdirected the jury on a question of law, and by the 15th that he has allowed in the assignment of facts, the question as to " whether that portion of the said line of Rail-" way, where the same crosses over and passes along the " highway was protected by gates, while no such gates are " required by law."

In the 6th, 13th, 17th and 18th reasons it is alleged that the verdict is not supported by the evidence, but contrary to evidence; that it has been proved that the Appellant, at the time of the accident, was not on the railway crossing, but that he was unlawfully trespassing upon and was carelessly and unlawfully walking along and across the Railway track, and that he was alone to blame for the accident to which he had contributed by his negligence and carelessness.

If I understand correctly that portion of the charge which is objected to, it was to the effect that if the jury were satisfied by the evidence, that the Plaintiff had crossed the railway *elsewhere* than on a Railway crossing, and that he was not at the time in the execution of a duty imposed upon him, as a custom house officer, by the act respecting the customs, he should be considered as any other individual crossing the Railway under the same circumstances. I cannot see any thing very wrong in the proposition so enunciated by the learned judge. Its applicability to the circumstances of the present case may be doubted, but as an abstract proposition of law, it seems to me to be faultless.

Supposing, however, that the learned judge was wrong in this statement of the law, this could not in the least degree have influenced the jury since they negatived the supposed case put by the jùdge, and found that the Plaintiff had crossed the track on the railway crossing, where he had as well as the whole public a perfect right to cross. There was therefore no occasion for them to apply the rule stated by the judge, and whether it was a good or a bad rule became immaterial, since it could only apply, in the case that the jury should have found that the Plaintiff had crossed elsewhere than on a public railway crossing. It is only then that it would have been necessary to examine whether that part of the charge was according to law, or not.

In *Twigg* and *Potts*, and others (1 Crompton, Meeson & Roscoe, 89), Baron Parke said: "Can we grant a new trial on the "ground of misdirection, which had no effect with the jury? "It would be idle to send the case down for further inquiry."

See also *Edmonstone* and *Machell*, 2, T. R., 4.

The other objection to the charge is that the judge did not tell the jury that there was no evidence that the Plaintiff was acting at the time, as a custom house officer, and that he left them to decide as a question of fact, what he should have decided as a question of law.

This could have no importance, unless the jury had found that the Appellant had not crossed the railway at a railway crossing, and being immaterial cannot be a ground for granting a new trial, as was held in Doe d, *Strickland* v. *Strickland* (8 C. B., 724) and also in *Clarke* v. *Arden* (1 Jurist, N. S., 710) also *Clarke* v. *Allen* (16, C. B., 227).

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The same reasoning applies to the objection made on the ground that the judge allowed an assignment of fact about gates. This was a collateral fact. The jury were not told that the Respondents were bound to have gates at the crossing of the public highway, nor that if there were no gates they were to find for the Plaintiff. They were merely asked to state if there were gates at the crossing or not, and as a collateral fact, might be useful to enable the jury to determine what were the proper precautions required to guard against accidents.

This simple question did not imply any obligation on the part of the Company to have gates there, and the answer whether in the affirmative, or in the negative,was immaterial, since the other findings of the jury are sufficient to sustain the verdict. In *Wilkes* and *Cutterbuck* (2 Bingham, 493) Chief Justice Best, said: "admitting that the judge was "wrong in allowing evidence to be given in contradiction of "the conviction, still if the warrant of commitment is illegal, "the Plaintiff is entitled to the verdict, and we do not grant "a new trial for misdirection, if the verdict be right.

In the case of The *Duke of New Castle* and *The Hundred of Broxton* (4, B. and A., 273).

Baron Parke said: "It is only in those cases in which we "are satisfied that the jury have been led to a wrong conclu-"sion that we ought to interfere; and we cannot say that "they have been induced to form a wrong conclusion," and the rule for new trial was discharged.

The Court of Review seems to have been of opinion that whether a misdirection of the judge or the admission of improper evidence was upon a material point or not, or whether the jury acted upon it or was influenced by it or not, made no difference and that in every case such misdirection or admission of illegal evidence was a ground for new trial. If such was the law, as was properly observed in the last cited case, "we should seldom have a case which in-"volved many facts brought to a termination."

The other grounds on which the Court of Review granted a new trial are want of evidence and that the verdict is contrary to evidence.

It is no doubt a good ground for a new trial that there is no evidence to support the verdict.

But when, as in this case, there is direct and positive evidence, by unimpeached witnesses, quite sufficient to justify the verdict, the Court cannot without disregarding the proper functions of a jury, grant a new trial, simply because such evidence is contradicted by other witnesses, except in very exceptional cases when the verdict is clearly and manifestly wrong, or when the presiding judge would manifest a strong opinion against the justice of the verdict, and even then his opinion in that regard is not by any means binding upon the Court (*Swain* v. *Hall*, 3 Wilson, 45, *Alloway* v. *Bennett*, 6, jurist, N. S., 347.)

In the present case the Presiding judge has expressed no disapprobation of the verdict and there is abundant evidence, to be found in the notes of evidence taken at the trial, to sustain the verdict.

James Cliff Nichols, says: "The Plaintiff and I, we came "out almost at the same time from the office of the Central "Vermont Railroad; the Plaintiff was two or three steps "a head of me; as he came out of the office of the Central "Vermont Railway Company, he directed his steps towards "Jacques Cartier street; he was going in the direction of the "freight depot when he was struck *on the crossing of Jacques* "*Cartier street*, by the pilot of the engine; when he was "struck he was very near the centre of the track; he must "have been a little northside of the centre of the track, as "when he was struck he rolled on the north side where I "was myself."

William Beakley, says: "Comme je venais du dépôt des "passagers j'apperçus le Demandeur sortant de l'office de Mr "Futvoye, avec des papiers.

....

"Le Demandeur en sortant a reviré à sa gauche, me faisant "face, et il s'en venait à ma rencontre, et on s'est rencontré "*près de la traverse;* nous étions tous les deux hors de la voie "ferrée; après ça je me trouvais assez proche pour prendre "la traverse; *le Demandeur était à l'autre bout du madrier et* "*se disposait à monter sur le madrier de la traverse.* Quand "on a vu l'engin sur nous autres il était trop tard; je n'ai eu "que le temps de m'échapper moi-même; au moment ou "j'étais à prendre la traverse, quand j'ai apperçu l'engin, il "n'était qu'a cinq ou six pieds de moi; le Demandeur était à

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" mon coté droit ; j'ai pu traverser et c'est tout ce que j'ai pu " faire. Après avoir traversé, j'ai entendu un cri, je me suis " retourné et j'apperçus le Demandeur sous l'engin ;............

....

" *Le Demandeur était sur le bout du pontage de la traverse pu-* " *blique lorsqu'il a été frappé ; j'en suis certain.* Il venait d'un " côté et moi de l'autre et nous nous sommes rencontrès tous " deux face à face *pour prendre la traverse.*

The same witness further says: " When Plaintiff was " struck and Nichols was seven or eight feet from him, " Plaintiff was facing me *on the crossing.*"

Daniel Kimball says: " The first thing that drew my atten- " tion on the occasion was some body hallooing. I looked " from whence came the cry and saw it came from towards " the engine ; I then saw the engine moving and *shoving the* " *Plaintiff on the planks of the crossing.*

John Atkinson, the engineer who was driving the engine which struck the Plaintiff, says: " I cannot state the exact " spot where the engine was when it struck Plaintiff. All I " know is that *it was at the plank crossing. I cannot say if the* " *engine struck the Plaintiff before it came to the plank crossing.*"

This is as to the spot where the Plaintiff was struck.

It is conclusively proved that the crossing at the Jacques Cartier street is within the town of St. John's, that it is an exposed and dangerous place there being no fence, no gates and no guard of any kind, and that by the rules of the company, " the bell must be rung when approaching a cutting, " *road crossing, station or junction, when at least eighty rods* " (440 *yards or eight telegraph poles*), *from such point and must* " *be kept ringing until such point is passed.* A long whistle " also must be sounded at the same distance...... and again " before the crossing is reached."

Nichols, who is a locomotive engineer of twenty-five years standing and who was following the Plaintiff at a distance of about eight or nine feet and was at about four or five feet from the engine when the accident occurred, says: " I did " not hear any bell rung nor whistle sounded, when the en- " gine passed me before it struck the Plaintiff.

" At the distance I was from said locomotive, if the bell " had been rung or the whistle, I expect I should have heard

" it; I am sure the bell of said engine was not rung, nor the " whistle blown." Richard Wilson & The Grand Trunk Railway Company

This is corroborated by the fact, that when this witness saw the danger he shouted "hold on" and, this was heard by the engineer and the fireman on the locomotive and apparently by the Plaintiff also, for some of the witnesses say that he stopped walking just an instant before he was struck by the locomotive.

It is difficult to suppose that if the bell had been ringing and the whistle sounding, at that time, the hallooing of Nichols could have been heard by the engineer, by the fireman, and also by the Plaintiff.

William Beakley, who crossed the track with the Plaintiff or at the same time, says: "Lorsque j'ai apperçu l'engin pour " la première fois, la cloche ne sonnait pas et le sifflet non " plus; j'en suis bien positif; s'ils eussent sonné la cloche ou " le sifflet, je suis certain que je l'aurais entendu. Si j'eusse " entendu sonner le sifflet ou la cloche, je ne me serais pas " risqué à passer."

"Je suis positif à dire que ni la cloche ni le sifflet n'ont " été sonnés."

Arthur Tenny who was the third nearest person when the accident occurred, being at about fifteen or twenty feet from the Plaintiff, says: "I did not hear the bell rung, nor the " whistle sounded when the accident occurred."

Daniel Kimball says: "On the occasion in question, I did " not hear the bell of said engine ring, nor its whistle sounded. " I think I was within such a distance that had the bell rung " or the whistle sounded, I would have heard it."

Truman Lawrence, one of the Respondents' witnesses, says, that the bell of the engine rang only once when coming out of the engine house and he did not hear the whistle.

There is here surely sufficient evidence that the accident occurred on the crossing of the railway, on Jacques Cartier street, and that the bell was not rung, nor the whistle sounded at the time, to justify the jury in their conclusion, that it was through the negligence of the servants of the company Respondent, in not giving sufficient warning, that the accident occurred and not through any fault or negligence of the Appellant.

This evidence is, however, contradicted by some of the

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Respondent's witnesses, both,as to whether the Appellant was on the railway crossing when he was struck, and as to whether the bell was ringing at the time.

The witnesses who say that the Appellant was not on the railway crossing when the Appellant was struck are Joseph Hébert and Truman Lawrence. Hébert is an employee of the Respondents; Lawrence is a conductor on the Central Vermont Railway. The latter was standing at about 117 feet from the place where the Appellant was struck and directly in front of the locomotive coming towards him. He establishes the spot were the Appellant was struck to be about ten feet from the end of the planks on the railway crossing, by means of foot prints, which he saw on the track, and which he says were those of the Appellant.

Hébert says the Appellant came out of Mr. Futvoye's office (the Vermont Central freight office), went in almost a straight line from the door of the office in to the railway track and walked between the rails a distance of seven or eight feet, until he was struck at a distance of from six to eight feet from the end of the planks on the railway crossing.

Atkinson and Gartrix, the engine driver and fireman, who were on the locomotive looking through the front window of the cab of the engine, did not see the Appellant at all, till after the accident, as they should have done if he walked on the track between the rails as Hébert states he did.

Gartrix being asked how he explains the accident, says, that the Appellant *must have come on the track very suddenly*, which he could not have done according to Hébert's statement.

The only other two witnesses who saw the accident are Livingston, an employee of the Respondents, who says, the Appellant was crossing the track diagonally when he was struck, without saying whether it was on the railway crossing or not, and Tenny, a witness who says the Appellant was not on the planks of the railway crossing, but does not know whether he was on the railway crossing or on the Respondent's property, but he indicates the spot by the letter "T" on plan marked "A" and says this was about ten feet from the end of the planks. He himself was in the middle of the street crossing, at a distance of from fifteen to twenty feet from the Appellant; the street being thirty-six feet wide, the middle of

it would be at eighteen feet from the Company's property on either side.

With the exception of the servants of the Company there is not a single witness who says he heard the bell rung or the whistle sounded before the Appellant was struck by the locomotive. It is impossible to suppose that if the bell had been ringing Tenny, Beakley and the Appellant would all three have ventured to cross the track in a most dangerous proximity to an approaching locomotive.

In this conflict of testimony, it was the special duty and the exclusive province of the jury to decide ; and when they have accepted the evidence of disinterested strangers who were the nearest to the place of the accident in preference to that given by the servants of the Company, who were not so favorably placed to see the occurrence, their verdict ought not to be set aside, (*Great Western* R. U. *Co. of Canada*, V. *Braid*, 1 Moore, P. C. C. N. S. 101, *Metropolitan Railway Company*, V. *Jackson*, 3 App. cas. 193. *Dublin*, *Wicklow and Hexford Railway Company*, V. *Slattery*, 3 App. cas. 1155).

But supposing that the Appellant was struck at a distance of from six to ten feet from the end of the planking on Jacques Cartier street, as Hébert and Lawrence state he was, would this exonerate the Company from all responsibility.

It is proved that the planking on the crossing at Jacques Cartier street, did not cover the whole width of the street by about twelve feet, the planking being only twenty-four feet wide, while the street was thirty-six feet wide. This planking was placed in the middle of the street to allow vehicles to pass over the rails and there must have been six feet of the width of the street, on either side of the planking. At most the Appellant could not have been on the Respondents' property more than three or four feet, beyond the line of the street, at a place were there was nothing to indicate the separation between the railway property and the street.

It has been strongly urged that this constituted a trespass on the part of Appellant, which relieved the Company from using those ordinary precautions of giving the warnings required by law and the very rules of the Company.

That a slight imprudence committed by a person receiving an injury, such as the crossing an unfenced railway at a few feet only from the crossing on a public street, should exone-

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rate from responsibility the party through whose gross negligence and disregard of the most ordinary precautions the injury was inflicted, is not the law, at least in this province, and I very much doubt whether it can be the law any where else.

The authority cited from Sourdat at No. 660 is only applicable to a case where the injured party has alone been the sole cause of the injury, as shewn by the examples stated.

A different rule indicated at the No. 662 of the same work, prevails when both parties are guilty of negligence.

" Lorsqu'il y a faute à la fois de la part de l'auteur du " dommage et de la partie lésée (says this author) la question " de responsabilité est abandonnée au pouvoir discrétionnaire " des tribunaux. *C'est à eux d'examiner si la faute imputable " à la partie lésée est seulement de nature à atténuer la respon- " sabilité de l'agent, ou, si elle est assez grave pour rendre la " partie lésée complètement irrecevable à se plaindre du dom- " mage éprouvé.*"

Larombière, under art. 1383 of the French Code, No. 30, also says:

" L'imprudence et la faute de la partie lésée ne sont cependant point, dans tous les cas, de nature a décharger de " toute responsabilité l'auteur du fait. *C'est ce qui arrive lors- " que le délit se rattache à une infraction, de la part de ce der- " nier, aux lois et règlements qui lui faisaient un devoir de pren- " dre, dans un intérêt public, certaines mesures de précautions " et de prudence.*"

Art. 1053 of the Civil Code says that: " Every person is res- " ponsible for the damages caused by his fault to another, " whether by positive act, imprudence, neglect, or want of " skill."

Under this rule the injured party cannot recover unless he proves that the injury was caused by the negligence of the other party, and when there is negligence on both sides, the inquiry is, as to whether it was the negligence of the complainant or of the defendant, which was the immediate or proximate cause of the accident.

In the present case this can be easily ascertained by answering these two questions;

Would the accident have occurred if the Appellant instead

of crossing the track where he did, had crossed it on the public highway a step or two further on ?

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Would it have occurred if the bell had been ringing?

It is in evidence, that, neither the engine driver nor the fireman on the locomotive saw the Appellant before the accident, that up to the time that he was struck they made no effort to stop the locomotive, and that they could not stop it, in the short space between the spot where the Appellant was struck and the public crossing, since it would require twenty-five feet to stop it, (see Atkinson's testimony), and that on that occasion it was not stopped till it was at the other end of the crossing. The necessary inference to be drawn from these facts is that the accident would equally have occurred, if the Plaintiff had been on the public crossing instead of being on the Respondents' property, and that his imprudence, if any, in crossing the track where he did,supposing he did so on the Respondent's property,was not the immediate cause of the accident.

The jury having found that the bell was not ringing at the time,we have in that omission positive evidence of the carelessness and negligence of the servants of the Respondents, and as this precaution is required for the purpose of warning those having occasion to cross the track, it must be deemed to be a sufficient warning to prevent accidents in all ordinary cases and that, therefore, the accident would not have occurred if that warning had been given.

The conclusion is therefore that it was the absence of the ordinary precautions required from the servants of the company which was the immediate or proximate cause of the accident, and not the imprudence or negligence of the Appellant.

This view of the case is supported by an analogous decision reported in Sirey, 1840-2, 471, also by the Dublin, Wicklow and Rexford Railway Company V. Slatterey, 3 App. Cas. 1155, & 39, L. T. 365.

The reproach made to the Appellant that he should have looked round, at his own peril, for the approach of a train, and that he should not have crossed the track in a diagonal course, does not apply to a case like this, when from the want of the usual precautions, the party injured may have been induced into error.

Stapley V. London, Brighton and South Coast Railway

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Company, 1 L. R. Exch. 21; Bilbec, V. London, Brighton and South Coast Railway Company, (18 B. C. N. S. 584).

If these pretensions of the Respondents were admitted, they would have the effect of dispensing altogether with the necessity of ringing the bell, a precaution deemed necessary in the interest of the public.

It is, however, unnecessary to consider in this case, what would be the effect of the negligence of the Appellant, if it had been proved.

The jury whose duty it was to settle the question of fact submitted to them, found that the Appellant crossed the track at the railway crossing, that the injury was caused by the negligence of the servants of the Company and without any fault or negligence on the part of the Appellant.

The majority of the Court is of opinion that the findings of the jury are, under the circumstances of this case, conclusive on the question of negligence, and that the judgment of the Court of Review ought to be reversed and the motion for new trial rejected.

The motion for judgment according to verdict will therefore be granted.

Cross, J.—On the 17th of May 1877, Richard Wilson employed in the Department of Customs at the Town of St. Johns, District of Iberville, brought an action returnable into the Superior Court there, against the Grand Trunk Railway Co. of Canada, in which he complained; that the said Company, being owners of a line of railway with locomotives and cars passing through part of the said Town of St. Johns, at which place it was laid along and across certain public highways; he having been for a long time in the employ of the Dominion Govèrnment in the capacity of Custom House Officer, on or about the 21st November, 1876, at the Town of St. Johns, aforesaid, while in the actual discharge of his duties as such Custom House Officer, at the depot or station of the said Railway Co. at St. Johns aforesaid, had occasion to cross the said railway on the public highway crossing thereof, at St. Johns aforesaid, and while on said crossing was, through the carelessness, negligence, unskilfullness and misconduct of the Company, and of their engineer and employees in charge of, and driving a locomotive of the Company, Respondents, struck

and knocked down by said locomotive being propelled against him from behind without his seeing the locomotive or having any warning or notice of the danger; whereby he lost his left arm and suffered other grievous injuries, for all of which he claims $6,000 damages.

The Respondents pleaded that Appellant's injuries were not caused by any fault or negligence on their part, but wholly through the fault and negligence of the Appellant himself;

That the Respondents, by their employees, were rightfully and lawfully at the time operating their engine over the track; were going very slowly, and had exercised all the customary precautions, ringing the bell and sounding the whistle;

That Appellant was not struck on the public crossing, nor whilst he was in the actual discharge of his duties as a Custom House Officer, nor whilst he was lawfully upon the railroad;

That the Appellant was, in fact, unlawfully trespassing upon the railway, and walking along and across the track, in violation of law, at a place where there was no public highway crossing, and carelessly, negligently, and without right walked along and across the track, and actually stood thereon, while the locomotive was approaching, and although all necessary warning was given, he, by his own fault, carelessness and negligence, contributed to, and caused the injury to himself, for which the Respondents were not responsible; That the injury could not have occurred if the Appellant had used due and proper care and diligence to avoid the same, and had not trespassed on Respondents' road.

A general denial was also pleaded, with special allegations denying that any such injury as that complained of, was caused by operating any locomotive of Respondents upon or over any railway belonging to Respondents.

Upon these issues, the Questions submitted to the Jury by whom the case was tried, and their Answers, are as follows, viz: (*See p.* 131).

On the verdict thus rendered, the Respondents moved for a new trial.

The Superior Court in Review, the tribunal to which such applications are by law referred, granted the motion for a new trial, and it is from this judgment, rendered on the 31st January, 1879, that the present Appeal has been instituted.

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Without going into any minute discussion as to the legal grounds for which new trials are granted, I shall assume that they are comprised within the general heads of, the verdict being contrary to law, contrary to evidence, and contrary to the weight of evidence; and, in this view, examine how far the Court below were justifiable in the conclusion they arrived at.

The verdict seems to me to have, in part, resulted from an erroneous impression given to the jury by the Judge who took the trial in his charge, as regards the law of the case; and is, therefore, in this respect partly founded on an error of law.

It is also, as I view it, contrary to the weight of evidence, if not entirely against evidence, especially as regards negligence, contributory negligence, and to whom attributable.

Certain leading facts in the case are indisputable, and in fact, are not disputed.

It is proved that the Appellant was struck by the Respondents' locomotive engine.

Also, as he himself alleges, and the evidence corroborates, and the jury have found, he was struck from behind while his back was turned to the approaching engine.

The place where he was struck was not the Respondents' road, but a piece of road belonging to the Stanstead, Shefford and Chambly Railroad Co., which Respondents had the privilege or right of using and were using. It was a short piece of road leading to an engine-house of the same Company, then also in use by the Respondents.

It does not appear whether this portion of railway was fenced, or if it was a locality that convenience admitted of being fenced, or if the Respondents, who had the casual use of it, could be under any obligation to fence it.

The general direction of the track, from the door of the engine house was north, or north-westerly, to join the main track of the Grand Trunk Railway leading to Montreal.

At a distance of about fifty-five yards from the door of the engine-house, the track leading from it north-westerly was crossed nearly at right angles by Jacques-Cartier or Richelieu street, which had a width of thirty-six feet, narrowed at the crossing to twenty-four feet, made up of the length of two

twelve feet planks, which formed the floor or bridge of the crossing.

Between the engine-house and the crossing in question, on the south side of the track, and at a distance therefrom of about eleven feet, stood a small building occupied as a freight office by the Vermont Central R. R. Co., the door thereof facing the track, was distant therefrom about twenty-five feet.

To the north of this small office, on the opposite side of the track, at a short distance beyond the crossing, stood a freight shed of the Respondents. From the door of the small freight office, extending to Jacques-Cartier street crossing, and parallel to the railway track, there was a raised footpath, by some called a gravel walk.

The Appellant, on the occasion of being struck, came out of the door of the small office while the engine was approaching, and was proceeding in the direction of the Respondents' freight shed, where he was going. He had got inside the rails of the track, or could not have been struck.

So far, I believe, there is no dispute about the facts.

What is brought into question, is the exact locality where Appellant was struck. He contends that it was on the planks of the crossing; the Respondents pretend that it was inside the track, before Appellant had reached the crossing.

The Appellant, from his position so near to being under the engine, could not be seen by the engine-driver and fireman in charge; but the actual collision of the Appellant with the pilot or cow-catcher was witnessed by several bystanders.

The Appellant's witnesses concur generally with those of the Respondents in demonstrating that Appellant was struck inside the rails, before he reached the crossing; but one of Appellant's witnesses makes an apparently contradictory statement. His evidence will be adverted to hereafter.

Nichols, the first of Appellant's witnesses who speaks to this point, says of Appellant: "He was going in the direction "of the freight depot when he was struck on the crossing of "Jacques-Cartier street by the pilot of the engine; when he "was struck he was very near the center of the track." Further on he says: "As I stepped out of the door of the Vermont "Central Railway office, and on stepping out I heard an en-"gine coming from engine house and I stood there: I im-"mediately looked in what direction Plaintiff was, I saw him

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" just stepping inside the track. My first impression then was " that Plaintiff would not have time to cross the track before " the engine came upon him, and I hallooed as loud as I " could " hold on " as well for the engineer as for the Plain- " tiff." Further on he says: " I don't know if Plaintiff had " been dragged by the locomotive but he was picked up some " distance from where he was struck. One of the persons who " picked him up was Truman Lawrence." And, in cross exa- " mination: " I am not able to say if Plaintiff stepped on the " track or not, before he got on the crossing...... I cannot " swear whether the Plaintiff was on the planks of the public " crossing when he was struck or not. My position at the " door of the office prevented me, but I saw his body."

It will be observed that this witness did not and could not from the cause he himself explains, see Appellant's position when struck; but Appellant's next witness, Arthur Tenny, did so, and clears up the matter. He says: " Plaintiff when " struck was on the right centre of the main line nearly op- " posite the Central Vermont Railway office; he was crossing " from the Central Vermont Freight Office, which I now in- " dicate on said Plan (Plan produced by Appellant marked A). " I now indicate by a line in ink on both plans, said line " marked A at one end, and T at the other, as the line which " Plaintiff followed from the door of the Central Vermont " Railway Office to the place where he was struck, which " place where he was struck, I have marked with a cross, at " the end of said line marked T. I am certain that the line " drawn, is the course followed by the Plaintiff from the " office of the Central Vermont Railway Co. to the place " where he was struck. I was about the middle of the high- " way crossing when I noticed the danger the Plaintiff was " in. Plaintiff at that moment was, as far as I can judge, at a " distance of fifteen or twenty feet from me...... A person can " proceed directly from the door of the freight office to the " freight office to the highway crossing, without going across " the track. Plaintiff could have proceeded directly from the " door of the office to the public crossing without crossing " the track.

" When Plaintiff was struck by the engine, I should say " he was ten or twelve feet from the planking on said public " crossing. He stood between an imaginary line that would

" be drawn directly from the office door at right angles, and " the planking on the public crossing.

" Plaintiff after having walked out of the office door had " not reached the planking when he was struck."

This witness clearly locates the spot where Appellant was struck, and marks it on the plans produced by both parties. He agrees fully in this respect with Respondents' witnesses, more particularly with Trumam Lawrence, who describes the occurrence with such circumstantial particularity as to leave nothing unexplained.

David Kimball, also Appellant's witness, says: " The first " thing that drew my attention on the occasion, was somebody " hallooing, I looked from whence came the cry, and saw it " came from towards the engine-house, I then saw the engine " moving and shoving Plaintiff on the planks of the crossing. " When I saw the Plaintff he was on the plank crossing, he " was being pushed from the end towards the engine-house, " to the end of said crossing towards the passenger depot."

On cross-examination he says: " I did not see the engine " actually strike Plaintiff. When I saw Plaintiff he was being " shoved on the crossing by the engine."

There remains Beakley's evidence. He was not a resident of St. Johns when the trial took place, but says he had a wood ward there at the time the accident occurred. No one speaks of having seen him on the occasion. If he had been near the place he mentions he could scarcely have failed to be noticed by the other witnesses. His statements are vague and frequently inconsistent; as for instance, although he repeatedly mentions having seen the engine which struck the Plaintiff come out of the engine-house, yet in one part of his cross-examination he says: " Je ne puis jurer positivement " que l'engin qui a frappé le Demandeur venait de l'engine- " house." From the vague, uncertain and incoherent manner in which he hazards his assertions, I think full reliance cannot be placed on his account of the manner in which the accident occurred. It is as follows:

" Quand je venais du dépôt des passagers j'aperçus le De- " mandeur sortant de l'office de M. Futvoye avec des papiers " dans la main.

" Le Demandeur en sortant a reviré à sa gauche, me faisant " face, et il s'en venait à ma rencontre, et on s'est rencontré

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" près de la traverse. Nous étions tous les deux, hors de la " voie-ferrée ; après ça je me trouvais assez proche pour " prendre la traverse ; le Demandeur était à l'autre bout du " madrier et se disposait à monter sur le madrier de la traverse.

" Quand on a vu l'engin sur nous autres, il était trop tard ; " je n'ai eu que le temps de m'échapper moi-même ; au mo- " ment où j'étais à prendre la traverse,quand j'aperçus l'engin " il n'était alors qu'à cinq ou six pieds de moi ; le Demandeur " était à mon côté droit ; j'ai pu traverser et c'est tout ce que " j'ai pu faire. Après avoir traversé j'ai entendu un cri, me " suis retourné et j'apperçus le Demandeur sous l'engin et je " n'étais pas capable d'aller le soulager, j'étais trop saisi ; je " le croyais tout en morceaux ; d'autres personnes sont alors " allé le ramasser. After succeeding having him on his feet, " I seen that his face was scratched and covered with mud " and blood.

" Le Demandeur était sur le bout du pontage de la traverse " publique lorsqu'il a été frappé. J'en suis certain. Il venait " d'un côté et moi de l'autre, et nous nous sommes rencontrés " tous deux face à face pour prendre la traverse."

If this means, as it would seem to import, that the witness and the Appellant met on the traverse, the witness from the north-east and the Appellant from the south-west, the engine coming from the direction of the south, the Appellant, to have been nearer the engine than the witness, must have been to the witness's left, not to his right, otherwise the witness would have been first struck, and the Appellant must have escaped, or come after the witness had got across, and rendered it impossible for him to see the collision. If on the contrary he means that both took the crossing together from the same side, he could not have been, as he says in his cross-examination, twenty-five feet from the Appellant, and the engine only five or six feet from him, as he states in his examination-in-chief. I infer from this, either that Beakley was not present at all, or that he only saw the Appellant after he had been crushed. He does not seem to have been present when the Appellant was extricated from under the engine. His story is inconsistent with Appellant's own version, that he was struck from behind. Indeed he says in a re-cross-examination : " Je n'ai pas vu si le Demandeur avait été frappé " dans le dos, dans le côté ou en face." And it may be re-

marked, that although he says in his examination-in-chief: "Le Demandeur était sur le bout du pontage de la traverse "publique lorsqu'il a été frappé," yet he does not say he saw him struck, and it is probable from the above explanations that he did not mean to say that he saw the Appellant struck.

The testimony of the Respondents on this point is direct and circumstantial. Joseph Hébert says: "Quand le Demandeur est sorti de l'office de M. Futvoye" (the small freight office of the Vermont Central R. R.) "lors de l'accident, il a "pris une ligne presque droite avec la porte de l'office, et est "entré sur la voie ferrée; et rendu là, il a marché l'espâce "de sept à huit pieds entre les deux lisses, dans la direction "de la traverse, et il a été frappé après avoir marché sept ou "huit pieds entre ces deux lisses; il a été frappé à six ou huit "pieds de l'extrémité des madriers de la traverse publique. "Je sais qu'il y a un pavé en gravois entre l'office de M.Futvoye "et la voie ferrée, le dit pavé conduisant à la traverse publique.

"Le Demandeur n'a pas suivi ce pavé pour arriver à la traverse; mais l'a laissé pour entrer sur la voie ferrée. La locomotive dans ce moment venait bien lentement. Quand "j'ai fait ces observations j'étais sur le dessus d'un char de "fret, dans une bonne position à tout voir." This is confirmed in a manner fully more distinct by the latter part of his cross-examination where he says: "J'ai vu le Demandeur sortir "de l'office; je l'ai vu embarquer sur la voie ferrée en dedans "des lisses, et là, je l'ai vu commencer à marcher; j'ai alors "entendu un cri; j'ai cessé de regarder pour un instant le "Demandeur afin de voir la cause pour laquelle on criait "ainsi; voyant qu'il n'y avait rien de dérangé autour de moi, "j'ai ramené mes yeux sur le Demandeur que j'ai vu marcher encore entre les lisses jusqu'à la complétion de sept ou "huit pieds de course comme je l'ai déjà dit, et c'est alors "qu'il a été frappé."

Truman Lawrence says: "I saw him coming out of the "door of the office, and my next sight was to see Plaintiff "standing still; just as he stopped, the engine struck him, "it was done at one and the same moment. When Plaintiff "was struck, he stood between the fifth and sixth tie from "the planking. After Plaintiff being picked up, I went and "examined the locality where he had been struck, and counted the ties and saw his foot marks in the sand. I took par-

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" ticular pains at the time, and am positive that it is the spot " where Plaintiff was struck, said spot is about ten feet from " the planking. As the cow-catcher had caught his feet, it " threw his body back, then Plaintiff came on his face and " fell forward to the ground; the engine shoved him till his " head came in contact with the planking at the crossing; if " the ground had not been wet as after a shower he would " have gone under the engine, but the engine shoved him off, " I saw Plaintiff's head double up as it struck the planks end, " and it shoved him two-thirds of the crossing." Thus he continues to give the fullest details of what happened.

R. H. Livingston says: " I saw the engine that struck " Plaintiff move away from the door of the engine-house; " shortly after the engine started, Plaintiff came out of the " Vermont Central freight office and was walking in a diago- " nal direction across the main line, colored red on plan " marked P. When he arrived a little over the centre of the " track, near the north rail, he made a momentary halt, and " the engine struck him on the legs and threw his body " back on the cow-catcher; he then fell forward with his " face downwards. I then ran downwards towards the place, " but before I arrived at the engine they had picked him up. " Plaintiff came out of the Vermont Central freight office, " after the engine was started from the door of the engine- " house."

D. R. Borland's evidence is corroborative. He was present when the Appellant was taken from under the engine.

A. M. Early says: " The bell was just ceasing to ring when " I arrived at the scene of the accident, and the engine was " only in the act of stopping when I got there; Plaintiff was " still there, and was being pushed on the planks of the " crossing."

Assuming that the above extracts compose, as I am satisfied they do, the material portions of the evidence on the point as to the locality where Appellant was struck, I think it can scarcely be said that there is any evidence at all of his having been struck on the crossing. The story to that effect is at variance with all the detail of facts and the attendant circumstances on the occasion, as well as with the precise marking of the exact spot by those who observed and specially noted it at the time. If admitted that there is any evidence

at all to the contrary, it must at all events be conceded that the weight of evidence is largely against Appellant having been struck on the public crossing.

If he were not on the crossing, he was distinctly violating the prohibition contained in the Railway Clauses Consolidation Act, Con. Stat. of Canada, Cap. 66, Sec. 18. "No person "other than those connected with or employed by the Rail- "way, shall walk along the track thereof except where the "same is laid across or along a highway," and was trespass ing on the track at his own peril. It was the actual trespass committed by the Appellant which exposed him to the injury he sustained.

It by no means follows that if he was on the public crossing when struck, the Respondents were in consequence guilty of negligence.

They had assumed no charge of the Appellant as in the case of a passenger.

A locomotive engine advances in a groove from which it cannot diverge. It has only a qualified power of arresting its forward course, practicable or not within a given space, according to the distance and the impetus with which it is impelled.

A person who wishes to cross its course, has the choice of his time and opportunity, and should be on his guard against the danger. His duty would naturally be to face the crossing squarely at right angles to the track, so that he could see an approaching engine either from the right or the left. Placed with his back to an approaching locomotive engine, or from whence one might be expected, can scarcely be pretended to be a position free from the imputation of negligence or void of responsibility.

Admitting that in such case it would be the duty of the engine-driver to stop the engine if he could, it would at least have to appear that he saw or could, in the ordinary course of his duty, have seen the person on the road, and that in time to have stopped his engine so opportunely as to avoid the accident.

From the short space involved, and the fact of the Appellant getting immediately under the engine on leaving the freight office, the engine-driver could neither have seen the Appellant, nor have had sufficient control to stop his engine

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in time. The evidence is precisely to this effect. Neither the engine-driver nor the fireman, who were both at their posts, saw the Appellant on the line, although the line was clear when they left the engine-house. It was from hearing outside shouting, and from signs made to them by persons who saw the Appellant, that they became aware the engine should be stopped.

But suppose the fact conceded, that Appellant was on the crossing when struck, he was still in fault. In addition to the authorities cited by Respondents, I will add one from the American Book, Sherman & Redfield, on negligence, as the result of cases there determined, where it must be admitted they have much experience in the matter of railway accidents. See § 488. "It is generally deemed culpable negli-" gence for any one to cross the track of a railroad operated " by steam power, without taking any precautions (if any are " reasonably within his power) to ascertain whether a train " is approaching; and, as a general but not invariable rule, " it is such negligence to cross without looking in every di-" rection that the rails run to make sure that the road is " clear...... It is an act of negligence to cross the track of a " railway, using steam power, at any other place than the " regular crossings; the statutes giving a right of action to " person injured by the neglect of a Railroad Company to " ring a bell at a highway crossing, do not confer such right " of action irrespective of the injured person's own negligence. " One whose own fault has contributed to his injury cannot " take advantage of these statutes, nor is the Defendant's " omission to ring a bell any excuse for the Plaintiff's omis-" sion to look up and down the track."

As to the ringing of the bell in this case, Respondents' six witnesses swear in the most positive manner, that both was the whistle sounded and the bell rung. It was the bell of the engine, No. 73, about which they could make no mistake; they knew it from its peculiarity of sound being different from all the other bells, its being fixed, and the bell rope being tied to the tongue. Two of them were the engine-driver and the fireman,—the latter the ringer of the bell, and the former standing by his side at the time.

Of Appellant's five witnesses who speak to the point, one, Boissonnault, says: "I heard engines ringing their bells and

" whistling that morning. I have heard whistles sounded " but could not say if it was the whistle of Vermont Central " or Grand Trunk engines." The other four say they did not hear the bell ring, and of these Beakley is the most positive that it did not ring. His testimony, for the reasons already explained, I consider of little weight, and the number practically reduced to three; for their statement, there may possibly be some cause; their attention was only called to the matter at or about the moment of collision, when the entire exertions of the engine-driver and the fireman would be directed to the stopping of the engine, and when there might possibly have been a momentary cessation from the necessity of the case, to enable them to do so, and when, in any case the ringing of the bell would have been too late to do any good, and could have been of no utility.

What does the same author I have just quoted, say on this subject? Conclusion of § 81: " Positive testimony that the " head-light of an engine was burning or that a bell or " whistle was sounding, is entitled to more weight than " negative evidence in relation to such facts; and where the " affirmative evidence on such a point is clear and circums- " tantial, a verdict against it cannot be allowed to stand on " the negative evidence of persons who had not special faci- " lities for knowing the facts."

So much for the questions of fact. Was the verdict contrary to evidence, or to the weight of evidence? Did the Superior Court, in estimating it to be so, exercise a fair discretion, which it was competent for them to do? I think they did, and I apprehend that it is not the duty of this Court to interfere with that exercise of discretion. I go so far as to say that if in the absence of evidence, as may be said of this case, the Court below had given the Appellant judgment, this Court should have interfered to reverse it; but more certainly where they only awarded a new trial, this Court ought not to interfere.

There is another point, a pure question of law, which seems to me fatal to Appellant's case viz., the misdirection of the Judge in instructing the Jury as follows: " Qu'ils avaient " à examiner d'après la preuve faite si le Demandeur, le 21 " Novembre 1876, agissait dans l'exécution d'un devoir à lui " assigné par ce paragraphe; ajoutant que dans le cas où la

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" preuve les convaincrait que le Demandeur n'était pas, ce " jour-là lorsqu'il a ainsi traversé la voie-ferrée, dans l'exécu- " tion d'un tel devoir, son acte en traversant la dite voie-fer- " rée, en supposant qu'il l'eût traversée à un endroit autre " qu'à son intersection avec le chemin public, devait être " considéré au même point de vue que l'acte de tout autre " individu dans les mêmes circonstances,"—thus giving the Jury to understand that Custom House Officers had a special immunity in regard to crossing Railway tracks at dangerous places, not possessed by other persons. Perhaps the learned Judge meant to say that Custom Officers might have occasion to cross Railway tracks to examine cars, on occasions when they were so placed that they would be obliged to cross the tracks at other than the ordinary crossings, but he did not so express himself; and, in either case, the instruction to the Jury would be wrong. It was equally incumbent on a Cus tom House Officer, as it was on any other person, to take or- dinary precautions in crossing a Railway track; and, if an exceptional case occurred, requiring him to pass over it where there was no crossing, it was incumbent on him to shew it.

It is obvious from the answer of the Jury to the second and ninth questions, particularly the latter, that they were misled by this direction of the Judge, because, when they might otherwise have been obliged to find that the place where Appellant was struck, was before the crossing was reached, and therefore, a trespass upon the Respondents' property, they avoid declaring it to be so by answering " No, he was not " trespassing, being there on official duty," implying that if he had not been there on official duty, he was trespassing.

It is to be regretted that no question was put to the Jury to elicit a direct or specific answer as to whether the engine or pilot of the engine came in contact with the Appellant before he had reached the crossing. It is suggested that this omis- sion may have enabled them to reconcile their answer to the ninth question, with those given to the third and sixth. Their answer to the ninth is significant of their meaning, and a natural result of the facts proved, if the direction of the Judge had been justifiable.

To me the case has much the appearance of being decided against law and fact; the Jury sympathising with the Appel-

lant in his misfortune, a misfortune to which he largely contributed, if indeed he was not the sole cause of it, and which it seems to me unfair to charge on the Respondents. To my mind the case is eminently one where a second trial is desirable.

If the verdict was influenced by the misdirection of the Judge, it ought to be set aside;—if contrary to evidence or to the weight of evidence, and the Superior Court in its discretion saw fit to grant a new trial, I apprehend that it is not the duty of this Court to interfere with that exercise of discretion;—and even if, in the absence of evidence, as may be said of this case, they had given the Appellant judgment, I think, that even in that case, this Court should have interfered to reverse such judgment and set aside the verdict.

BABY, J., Concurred in the dissent of Mr. justice Cross.

Judgment reversed.

Ed. Carter, *Q. C.*, for Appellant.
Geo. MacCrae, *Q. C.*, for Respondents.

MONTREAL, 23RD SEPTEMBER 1881.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, J. J.

No. 45.

THE MERCHANTS BANK OF CANADA,

Plaintiffs in the Court below,

APPELLANTS;

&

GEORGE WHITFIELD,

Defendant in the Court below,

RESPONDENT.

&

GEORGE WHITFIELD,

Plaintiff en garantie *in the Court below*,

APPELLANT;

&

EDWARD MACDONALD,

Defendant en garantie *in the Court below*,

RESPONDENT

HELD:—1o. In *The Merchants' Bank vs. Witfield*, reversing the judgment of the Court below, that a note payable on demand given to a Bank to secure an overdrawn account of the maker, as well as to secure the forbearance of theBank for other advances, must be considered in the light of a continuing guarantee, and that the indorsers of such a note are not relieved from their liability by the fact that the Bank did not make a

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demand of payment till after the insolvency of the maker. about twenty-seven months after the date of the note.

2o. In *Withfield vs. MacDonald*, reversing the judgment of the Court below: That in an action on a note indorsed for the accommodation of the maker it is sufficient to allege that the note passed from the maker to the several successive indorsers for value received, without declaring upon it as having been endorsed by the several indorsers as sureties of the maker.

3o. That the several successive indorsers of a promissory note indorsed for the accomodation of the maker are liable to each other in the order of their respective indorsement, the same as if the indorsements had been for value received, unless there be an agreement to the contrary.

4o. That such an agreement which is to destroy the legal effect of a written instrument can only be proved according to the rules of evidence laid down in articles 1234 and 1235 of the Civil Code.

Dorion, C. J.—The Merchants Bank of Canada instituted an action before the Superior Court, at St. Johns, against Edward Macdonald, George Whitfield and Isaac Coote, to recover the amount of three promissory notes, made by the St. Johns Stone China Ware Company, and successively endorsed by the three Defendants.

One of the notes for $10,000.00, bearing date the 24th of July, 1875, was payable on demand. The other two notes, one for $8,500.00, and the other for $4,500.00 respectively dated 21st and 26th of March, 1877, were payable at three months from date.

Whitfield being the second indorser, instituted an action *en garantie* against Macdonald, the payee and first indorser on the three notes.

Neither Macdonald, nor Coote contested the principal action, and they were both condemned to pay the amount demanded.

Whitfield contested the action of the Bank, and by the same judgment rendered on the 1st of September, 1879, he was condemned to pay jointly and severally with Macdonald and Coote the two notes of the 21st and 26th of March, 1877, but the action against him was dismissed as regards the note of the 24th of July, 1875, on the ground that the demand of payment of this note had not been made within a reasonable delay—the note being payable on demand.

On the same day, the Court dismissed the action *en garantie* by Whitfield against Macdonald, on the ground that it was alleged in the declaration, that the three notes had been successively endorsed by Macdonald, Whitfield and Coote, for value received, while it appeared by the evidence, that the notes were not transferred from one endorser to another, but that they all three stood in the position of co-sureties, and

that the action as brought could not be maintained. The Court however reserved to Whitfield any recourse he might have against Macdonald.

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Two appeals have been instituted from these two judgments, one by the Bank complaining that its action had been improperly dismissed as to the note of the 24th of July, 1875, and the other by Whitfield, who complains of the judgment by which his action *en garantie* has been dismissed.

The two appeals have been united by order of this Court, as the two cases had been united in the Court below.

We are of opinion that both judgments of the Superior Court should be reversed.

As regards the principal action, the question is, whether the Merchants Bank by allowing the note of the 24th of July, 1875, to lay in its possession for twenty-seven months without demanding payment from the maker, was guilty of such laches as to relieve Whitfield of his liability as indorser of the note?

It cannot be made the subject of a doubt, that in the case of a note payable on demand and transferred in the ordinary course of business for value received, the holder is bound to demand payment and to protest the note within a reasonable time, and that a demand made so long as twenty-seven months after the note had come into the possession of the holder would be considered as having been made too late. In this case, however, the note in question was not indorsed in the ordinary course of business, it was a note given and indorsed to secure an overdrawn balance of the Company's account with the Bank, as well as to obtain further advances and the forbearance of the Bank for the sums already due by the Company. The note was received and held by the Bank as a collateral security for overdrawn balances, and as a continuing guarantee for an indefinite period for the payment of such balances. It is not unusual for such transactions to be represented by notes payable on demand. Byles, on Bills, p. 213, says, "but a common promissory note, payable on demand, is often originally intended as a continuing security, &c." *Brooks* & *Mitchell*, 9 M. and W. 15.

In the present cause it would have been in the power of either party to fix a term to their respective obligations by giving notice to that effect, to the other party; but as time

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and forbearance towards the Company was the main consideration for giving the security, it would have been against the spirit of the whole transaction and against good faith, if the Bank had pressed for the payment of this note, immediately on becoming possessed of it, or even within such time, as would, in ordinary cases, be considered within a reasonable delay to present a note payable on demand, the note having been given for the very purpose of preventing the Bank from enforcing the payment of its claim against the St. Johns Stone China Ware Company.

The demand of payment was made a very short time after the Company had been placed in Insolvency, and there is no evidence that the Bank had any knowledge that the Company had become insolvent, until it was actually forced into bankruptcy by the action of some of its creditors. The Respondent was a director of the Company when he endorsed the note, and it does not appear that he had ceased to be a director, when the Company failed. He was therefore in a better position to know the affairs of the Company, than the officers of the Bank, and he could at any time have notified the Bank to press the payment of the note, or put an end to his liability. If therefore he is exposed to suffer injury from delay, it is due to his own laches and not to any neglect on the part of the Bank.

This judgment must therefore be reversed, and the Respondent Whitfield condemned to pay jointly and severally with the other two Defendants the amount of the note of the 24th of July, 1875, as well as of the other two notes.

The question involved in the action *en garantie* by Whitfield against Macdonald, is whether Whitfield has a recourse against Macdonald, a prior indorser, to be indemnified for the payment of the three notes, or whether the indorsers are to be considered as joint sureties bound between themselves as contributors for the payment of the notes.

The circumstances which have given rise to this question are as follows:

On the 24th of July, 1875, W. L. Marler, the agent of the Merchants Bank, at St. Johns, wrote to A. K. Levicount, Secretary of the Company, the following letter.

" St. Johns, 24th July, 1875.

" A. K. Levicount, Esqr.,
" Secretary St. Johns Stone China Ware Company :

" Dear Sir,

" Respecting your President's application to the Bank for " further extension of your credit, I have the pleasure to in- " form you that you have been allowed an extension of four " or five thousand dollars in case of need. The Bank, how- " ever, requires that the present advances, as they mature, " be secured by the personal guarantee of your directors, " should renewals be required which could be done by their " endorsation of the notes.

" Your account current is now overdrawn seventeen thou- " sand six hundred and fourteen dollars and fifty-four cents ; " by giving me the Company's note endorsed as required, for " eight thousand five hundred dollars, you will reduce your " overdrawn account to about nine thousand three hundred " dollars, leaving a balance of seven hundred dollars of above " loan.

" I enclose a letter of guarantee along with a note for signa- " ture by your directors, as required by the Bank, to take the " place of Mr. Edward Macdonald's personal security for like " amount.

" Yours truly,

(Signed), W. L. MARLER, Agent."

The St. Johns Stone China Ware Company was then indebted to the Bank in large sums of money consisting of notes current and overdue balances, as stated in the letter. The Respondent Macdonald who was President of the Company was an indorser on the Company's paper to an amount of $65,000, and he held mortgages on its property for about $35,000. (W. L. Marler's deposition page 6 of appendix to Respondent Macdonald's factum).

At a meeting of the Directors of the Company held on the 5th of August, 1875, at which the five Directors Macdonald, Whitfield, Coote, MacPherson and Marler were present, the following resolution was adopted :

" The letter of the agent of the Merchants Bank of the 24th " *ultimo* was submitted, and the Directors agreed to give the

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"personal indorsation asked for by the Bank, and the Secre-"tary was instructed to have the said notes drawn out, "signed as required and handed over to the Merchants Bank."

(Signed), EDW. MACDONALD, President.
A. K. LEVICOUNT, Secretary.

The note for $10,000, dated the 24th of July, 1875, was signed after this meeting by the Secretary for the Company and was endorsed by Macdonald, to whose order it was payable, and by Whitfield, Coote and MacPherson, in the order named, and was handed by the Secretary to the agent of the Bank, accompanied by the following letter:

"St. Johns, 24th July, 1875.

"W. L. Marler, Esq., Agent, St. Johns.

"Dear Sir,

"In consideration of the Merchants Bank of Canada allow-"ing the Stone China Ware Company to overdraw their ac-"count to the extent of ten thousand dollars, we herewith "deposit with you as collateral security for the payment of "such overdrafts, the demand note of the Company endorsed "by the following Directors individually E. Macdonald, I. "Coote, J. MacPherson, and we hold ourselves liable without "prejudice to the ordinary legal remedies. Subscribe our-"selves.

"Your obedient servant,

(Signed), EDW. MACDONALD,
I. COOTE,
JAMES MacPHERSON."

Marler, the agent of the Bank, in his deposition, in the Bank's factum, p. 10 of the evidence, says:

"The note Exhibit No. 1, for ten thousand dollars, was "delivered to the Merchants Bank, (Plaintiff) by the then "Secretary of the Company, A. K. Levicount. It was accepted "by Plaintiff as complying with its request, contained in the "letter of the 24th of July."

"The letter Exhibit X, of Plaintiff," (that is, the letter of guarantee signed by Macdonald, by Coote and by MacPherson) "was delivered to Plaintiff by said Secretary, together with "the note in question."

" Although the letter and note bear date the twenty-fourth " of July, they were only delivered to Plaintiff after the " meeting of directors on the fifth of August."

The witness further states that both the note and the letter were prepared by him on the 24th July, with the exception of the marginal note added to the letter, and that they were given back to him after they had received the signatures of the Company and of the directors. He does not know why the letter was not signed by Whitfield, except that he heard from Levicount that Whitfield was absent and that it was impossible to obtain his signature. This evidence was objected to by Whitfield.

Macdonald was also examined, and in his deposition p. 7 of the evidence in the Bank's factum, he says:

" The letter Plaintiff's Exhibit X, I signed at the sametime " as the note Plaintiff's Exhibit No. 1. A blank was left in " said letter for Mr. Whitfield to sign it. But I cannot remem- " ber for what reason he did not sign, he might have been " called at the moment we were signing that letter, but I " cannot remember why he did not sign it."

No explanation whatsoever is given why Whitfield did not sign the letter, although both the letter and the note were signed at the same time by the other parties.

The two notes of the 21st and 26th of March, 1877, are renewals of other notes which prior to the 24th of July, 1875, were endorsed by Macdonald alone.

The ground on which the Court below dismissed the Appellant's action, is not that he had no remedy against Macdonald, since his recourse was reserved by the judgment, but simply that the action was not rightly brought inasmuch as the Plaintiff had declared upon notes endorsed and transferred to him, and by him to Coote, and by Coote to the Merchants Bank, while it appeared by the evidence that the notes in question had never been transferred to him, and that the relations existing between the several indorsers should have been stated as those of sureties, and not simply as indorsers.

This objection is we believe groundless. If Whitfield has any recourse against Macdonald, the form of the action must be regulated by the form which they themselves have given to their contract. It has never been necessary in an action by an accommodation indorser against a preceding indorser

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or the maker of a note to make any other allegations but those required in the case of a note transferred for value received. This same objection was urged by Whitfield against the action of the Bank, and we have considered it as totally unfounded. *Morris vs. Walker*, 15, Q. B., 589. *Wilder vs. Stevens*, 15, M. & W., 208.

On the merits it is contended on behalf of the Respondent Macdonald, that the notes were endorsed for the accommodation of the St. John's Stone China Ware Company, and that the several indorsers are to be treated as joint sureties and not as successive indorsers. To establish this position, great stress was laid on the resolution of the 5th of August, 1875, and on the evidence given by Marler, Coote and by Whitfield himself.

It must be observed as regards the resolution of the 5th of August, that no resolution of the board could bind the directors present to become surety for the Company, unless such resolution was signed by such directors. Art. 1235, C. C. If the resolution was binding on the directors individually, all the directors present when it was adopted should have endorsed the notes of the Company; yet MacPherson, one of them did not endorse the notes of the 21st and 26th of March, 1877, and Marler, another director, did not endorse any of the notes, and it cannot be seriously contended that under this resolution he could have been compelled to endorse them.

It is also to be remarked that the Bank merely asked the indorsement of the Directors on a note for $8,500 to cover part of the overdrawn account of the Company, and that by the resolution it was only agreed to give the indorsation asked for, while the note endorsed by the Directors to cover the overdrawn account is for $10,000. The resolution therefore does not apply to the note in question and cannot be invoked as containing an agreement on the part of Whitfield to endorse this note of $10,000 as surety for the Company.

The liability of the several indorsers of this note of $10,000, as between themselves, must therefore be determined from the transaction as evinced by the note itself, as the letter of guarantee which accompanied it is not signed by Whitfield. No explanation has been given why the letter which was signed by the other Directors was not signed by Whitfield, the necessary inference to be drawn from the absence of his

signature is that he refused to sign it, since Macdonald admits that a place had been left for his signature. This is corroborated by the testimony of Marler, who, being anxious to obtain the signature of Whitfield to the letter of credit was told that he was absent and that it could not be obtained. Yet his endorsement was obtained on the $10,000 note and through his attorney on the two other notes on which this action is brought.

In the absence of any agreement to the contrary, the rule is that every indorser on a promissory note guarantees to every subsequent indorser and to the holder the payment of such note, and as an indorser who pays a note, is entitled to recover the amount from all the preceding endorsers and from the maker (art. 2314 and 2346 of the Civil Code), so the indorser who is sued on a promissory note has a right to call in the cause such prior indorsers and the maker as his *garants* to indemnify him against any condemnation which may be pronounced against him.

Pothier, contrat de change, No. 153. The same author at No. 161, 2 § says: "Le refus de paiement de la lettre donne "pareillement lieu à l'action en garantie que chacun des en-"dosseurs a contre tous les endosseurs précédents et contre "le tireur, etc." Massé, Droit commercial, t. 3, No. 1,997. *Beaubien & Demers*, 5, Revue Légale, 244. *Desbarats & Hamilton*, 2 Legal News, 279.

Daniel, on negotiable securities, vol. 1, p. 520, § 703.

"When several persons indorse a bill or negotiable note in "succession, the legal effect is to subject them as to each "other in the order they endorse. The endorsement imports "a several and successive, and not a joint obligation, whether "the endorsement *be made for accommodation or for value re-"ceived, unless there be an agreement aliunde different from "that evidenced by the endorsements. The endorsers for accom-"modation may make an agreement to be jointly and equally "bound, but whoever asserts such an agreement must prove it.* "In cases, therefore, in which no such agreement is proved, "the endorsers are not bound to contribution amongst them-"selves, but each and all are liable to those who succeed "them.

"This doctrine rests upon clear and satisfactory principles. "Each indorser places his name upon the instrument,

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"whether for accommodation or otherwise, knowing that he "renders himself conditionally liable to every subsequent "and successive endorser; and that he has his recourse "against every antecedent party, for the whole amount which "he may be obliged to pay. With such knowledge of his "liabilities and his remedies,he voluntarily assumes his rela- "tion to the instrument with others who assume a different "relation, accompanied by increased or diminished risk or "loss. And contribution does not arise between such succes- "sive indorsers by operation of law, but only when estab- "lished by special agreement."

The writer cites in support of this rule a number of decisions which leave no doubt as its being the recognized jurisprudence of the United States since the case of *Macdonald & McGruder*, decided by Mr. Justice Marshall. (3, Peters, 472).

In England the recent case of *Steele vs. McKinlay*, (5, appeal, cas. 574), wherein it was held by the House of Lords that to bind an endorser to a liability different from that which the law-merchant infers from the signature of such indorser, as it appears on the back of a bill, requires a special contract, which can only be proved by a writing signed under, in Scotland the 6th Section of the 19 and 20 Vict., C. 60, and in England the 29th Cav. 2, C. 3, S. 4, seems to have finally decided the question, whatever doubts might have existed before, in the same sense as the Courts of United States have done, and according to the undoubted principles of French law.

The Court of Error and Appeal in Ontario have also held in *Janson vs. Paxton*, (23 C. P. U. C. 439), that the successive endorsers of a note, merely on proof that it was made for the accommodation of the maker, are not necessarily to be regarded as co-sureties and so liable to contribution; *but that in the absence of any agreement to the contrary, the parties on such proof may be considered as having entered into a contract of suretyship, in the terms in which the note and the endorsements are known to create;* and that the first endorser having paid the note could not recover contribution from the second. (*See also Fisken et al & Meehan.* 40, *Q. B. U. C.* 145).

There is no writing in this cause to establish the existence of an agreement altering the ordinary liability arising out of the order in which the parties have endorsed the notes on which this action is brought,—for as we have already inti-

mated, the resolution of the 5th of August, 1875, is not such a writing as could be received in evidence for that purpose, either under the statute of frauds or the article 1235 of the Civil Code of Lower Canada.

The Respondent also invokes the answers of the Appellant, when examined as a witness; but while admitting that the notes were made and endorsed for the accommodation of the Company, the Appellant adds that he was urged by the Respondent to endorse the notes after Macdonald had himself endorsed them, and that he felt perfectly safe in doing so after him. The answers of the Appellant cannot be divided. They must be taken together and in connection with his whole deposition and cannot be construed into an agreement that the Appellant should be held as a contributor with Macdonald for the payment of these notes. Not only is there no agreement to that effect, but the refusal of the Appellant to sign the letter of guarantee of the 24th of July, 1875, shows conclusively that he did not wish to be bound as a joint surety with Macdonald and the other Directors who signed this letter.

The position of Macdonald was in this case quite exceptional. He was President of the Company and presumably a large stockholder, he held mortgages on the property of the Company to the amount of $35,000, and was besides an indorser on the paper of the Company for about $65,000. Macdonald had, therefore, a fortune involved in the success of the Company, while Whitfield was only interested to the extent of $4,000 of paid up stock and a disputed claim of $4,000 more. It is impossible to suppose that, under these circumstances, Whitfield would have been willing to pledge his own responsibility for the purpose of relieving Macdonald of one third of his liability for the $65,000 of notes, which the latter had already endorsed for the Company.

It was competent for the parties to have settled by a private agreement the order and extent of the responsibility of each of them in guaranteeing the debts of the Company. Instead of doing so they have adopted a form of engagement which, in its legal bearing, necessarily implies that Macdonald is primarily, and Whitfield only secondarily responsible.

We consider that both by the contract resulting from the successive indorsements appearing on the back of the notes,

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as well as from the presumptions arising out of the other circumstances of this case, Macdonald is bound to indemnify Whitfield, and that the judgment of the Court below must be reversed.

Judgment reversed.

Abbott, Tait, Wotherspoon & Abbott, for the Merchants Bank.
E. Z. Paradis, for Geo. Whitfield.
R. Laflamme, Q. C., Counsel.
W. W. Robertson, for Macdonald.
S. Bethune, Q. C., Counsel.
Jos. Doutre, Q. C., Counsel.

MONTRÉAL, 22 NOVEMBRE 1881.

Coram DORION, J. C, RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 255.

OLIVIER FAUCHER, FILS,

Demandeur en Cour Inférieure,

APPELANT;

ET

JAMES P. BROWN,

Défendeur en Cour Inférieure,

INTIMÉ.

JUGÉ :—Que pour permettre à un Demandeur d'assigner le Défendeur dans un autre district que celui de son domicile, en vertu de l'art. 34, C. P. C., sous le prétexte que l'action est portée dans le district où le droit d'action a pris naissance, il faut que ce droit ait pris naissance dans un seul district ; si, au contraire, il a pris naissance dans différents districts, l'action devra être portée devant le tribunal du domicile du Défendeur, à moins qu'il ne soit assigné personnellement dans un autre district,

DORION, J. C.—Cette action a été portée par l'Appelant pour faire radier une hypothèque que l'Intimé a prise à son préjudice et contrairement à une convention expresse, sur les immeubles de Henri Painchaud, leur débiteur commun.

Par sa déclaration l'Appelant allègue, que le 12 février 1880, l'Intimé serait venu à Montréal, avec Painchaud, son débiteur, et aurait engagé l'Appelant à ne point prendre de procédés en vertu de l'acte des faillites, contre Painchaud, qui promettait de donner à l'Appelant une hypothèque sur ses immeubles, avant d'en donner une à l'Intimé, ce à quoi ce dernier aurait consenti.

Que Painchaud lui aurait en effet consenti une obligation,

le 12 février 1880, qui a été enregistrée au bureau d'enregistrement à Sainte-Martine, le 14 du même mois; mais que sans égard à leur engagement, Painchaud aurait consenti une hypothèque en faveur de l'Intimé, qui l'aurait fait enregistrer le 13 février, un jour avant l'enregistrement de celle de l'Appelant. O. Faucher, fils & J. P. Brown

Les conclusions sont que cet enregistrement soit déclaré avoir été fait en fraude des droits de l'Appelant, et qu'il soit enjoint au régistrateur de Sainte-Martine d'intervertir l'ordre de l'enregistrement des deux hypothèques, en donnant la préférence à celle de l'Appelant.

L'Intimé a répondu à cette demande par une exception déclinatoire, alléguant qu'il demeurait dans le district de Beauharnois, que l'action était une action réelle qui aurait dû être portée dans le district ou sont situés les immeubles hypothéqués et, qu'en supposant que ça serait une action personnelle, le droit d'action n'avait pas pris naissance dans le district de Montréal, en sorte qu'il aurait dû être assigné dans le district de Beauharnois, où il a son domicile

La Cour Inférieure a admis cette exception et a renvoyé l'action de l'Appelant, qui se plaint de ce jugement et demande à ce qu'il soit infirmé.

Nous croyons que l'Intimé a raison sur les deux points. L'action, participe tout à la fois, d'une action en déclaration d'hypothèque et en radiation de l'hypothèque de l'Intimé.

L'Appelant demande à ce que la Cour déclare qu'en vertu de la convention entre lui, Painchaud, son débiteur, et l'Intimé, l'hypothèque de l'Appelant soit déclarée primer celle de l'Intimé, et, comme conséquence, il demande à ce que l'enregistrement de cette dernière hypothèque soit radié pour n'être enregistrée qu'après la sienne.

Le droit d'hypothèque est un droit réel, et l'action qui a pour objet de faire changer l'ordre des hypothèques obtenues par l'Appelant et l'Intimé est une action mixte qui, d'après l'art. 37 du Code de Procédure Civile, aurait dû être portée soit devant le tribunal du domicile de l'Intimé, ou devant celui du lieu où sont situés les immeubles.

Si l'action peut-être est considérée comme purement personnelle, elle ne pouvait être portée dans le district de Montréal, parce que d'après l'art. 34 du Code de procédure, le Défendeur dans une action purement personnelle doit être assigné soit

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devant le tribunal de son domicile, soit devant le tribunal du lieu où la demande lui est signifiée personnellement, ou devant le tribunal du lieu où le droit d'action a pris naissance.

Le Défendeur n'a pas été assigné à Montréal, mais à son domicile dans le district de Beauharnois. S'il peut être traduit devant la Cour dans le district de Montréal, ce n'est que parce que le droit d'action y aurait pris naissance. Or le droit d'action de l'Appelant dépend de deux faits, la convention intervenue à Montréal, par laquelle l'Intimé s'est engagé à ne pas prendre d'hypothèque sur les biens de Painchaud avant celle de l'Appelant et le fait, qu'au mépris de cet engagement, il a pris une hypothèque qu'il a fait enregistrer au bureau d'enregistrement du district de Beauharnois.

Le droit d'action résultant de deux faits dont l'un a eu lieu à Montréal et l'autre dans un autre district, l'on ne peut pas dire, que le droit de l'Appelant ait pris naissance dans le district de Montréal.

Il ne suffisait pas à l'Appelant pour maintenir son action d'alléguer la convention entre lui et l'Intimé, il lui fallait de plus alléguer que celui-ci avait enfreint ses obligations, en fesant enregistrer dans le district de Beauharnois un acte qui lui donnait une hypothèque sur les biens de Painchand, qui primait la sienne. Ce dernier fait était aussi essentiel à l'action de l'Appelant que l'allégué de la convention même. En portant son action dans le district de Montréal, il l'a portée dans un endroit où une partie seulement des faits qui lui donnaient un droit d'action, et non pas à l'endroit où tous les faits essentiels à son action, se sont passés. Il n'est donc pas dans les termes de l'article 34 qui veut que, pour assigner un Défendeur devant un autre tribunal que celui de son domicile, il faut que le droit d'action ait pris naissance dans ce district.

Il faut se rappeler que la règle générale c'est que tout défendeur doit être assigné à comparaître devant le tribunal de son domicile. Ce n'est que par exception qu'il peut, dans certains cas, être assigné devant un autre tribunal. Chaque fois donc que le défendeur n'est pas dans les termes de l'une des exceptions contenues au Code, il a le droit d'insister, à ce que la demande que l'on fait contre lui, soit portée devant le tribunal de son domicile.

Les faits qui constituent le droit d'action de l'Appelant se

sont passés dans deux districts. Ils auraient pu avoir lieu dans trois, quatre districts ou même plus. Si la prétention de l'Appelant est fondée, un Défendeur pourrait dans un cas semblable être traduit dans autant de districts différents qu'il y aurait de faits qui contribueraient à former le droit d'action de l'Appelant. En effet, dans un cas ou chaque fait est essentiel au droit d'action du Demandeur, l'on ne peut établir de préférence entre tel ou tel autre fait pour décider où l'action sera portée.

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La règle à suivre c'est que chaque fois que le droit d'action du créancier aura pris naissance dans un seul district, ce créancier aura le droit de traduire son débiteur devant le tribunal de ce district.

Si au contraire le droit d'action a pris naissance dans différents districts, l'action devra être portée au tribunal du domicile du Défendeur, à moins qu'il ne soit assigné personnellement dans un autre district.

Une autre observation à faire, c'est qu'il n'y a que les actes qui affectent directement les droits des parties, qui doivent être considérés comme servant à déterminer le lieu où le droit d'action a pris son origine, et que les faits qui ne sont que des incidents aux faits principaux, comme le serait par exemple un transport ou cession des droits fait au Demandeur, un changement d'état ou tout autre fait accidentel n'ayant pas un rapport direct sur le droit d'action du Demandeur, en quelques lieux qu'ils se soient passés, n'empêcheraient pas le Demandeur de porter son action devant le tribunal du lieu où se sont passées les transactions entre les parties ou les délits ou quasi délits, qui font la bâse et constituent le droit d'action.

Pour ces raisons et sans examiner les jugements contradictoires rendus sur cette question, nous croyons que le jugement de la Cour Supérieure doit être confirmé.

Jugement confirmé.

Lareau & Lebeuf, Avocats de l'Appelant.
MacLaren & Leet, Avocats de l'Intimé.

MONTREAL, 19TH JANUARY 1882.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, J.J.

No. 230.

JAMES B. ALLIOT,

Intervening party in the Court below,

APPELLANT;

AND

THE EASTERN TOWNSHIPS BANK,

Plaintiff in the Court below,

RESPONDENT.

HELD, reversing the judgment of the Court below, that under an emphyteutic lease, the lessor has not, for the payment of the rent and other obligations of the lease, the privilege which he has in an ordinary lease on the moveable property found in, or removed from, the premises leased.

This action has been instituted by the Respondent, as representing Philip Maher, who represented the original lessors of a piece of land and premises under an emphyteutic lease, against William Hobbs, as representing the Mill Vale Bark Extract Co., the original lessee, to recover a sum of $2,000 damages done by the Defendant in removing certain machinery from the premises. This action was commenced by a writ of *saisie-gagerie* to attach in the possession of the Grand Trunk Co. certain machinery which were removed from the premises.

The Appellant intervened in the cause and alleged, that: William Hobbs, the Defendant, had sold to him, on the 29th of September 1874, all the rights in the emphyteutic lease which he had purchased at a sale made by the Sheriff, on the 29th of April 1874, as belonging to the Mill Vale Bark Extract Co. and which comprised the buildings, as well as the machinery and fixtures therein contained; — that these two deeds were registered; — that Maher had recognised this transfer, and that John Fair, Maher's assignee, had consented to the removal of the machinery seized; — that Respondent had no right to the emphyteutic lease and that they never had any right to seize the machinery which were in the premises. This intervention of the Appellant by which he claimed *main levée* of the seizure, was met by the Respondent by a plea amounting to a general denegation of the allegations of the intervening party.

Dorion, C. J.—The Honorable H. Aylmer and H. L. Aylmer leased, on the 10th day of January 1872, to the Mill Vale Bark Extract Company, for ten years, a tract of land in the Township of Melbourne. The parties have called the lease an emphytheutic lease and it is so described in the declaration and intervention in this cause.

The rights resulting from this lease were seized on the Mill Vale Bark Extract Co., and sold to William Hobbs, who sold them to the Appellant.

H. Aylmer acting for General Aylmer transferred his rights arising out of the lease to Philip Maher. Philip Maher mortgaged to the Respondents the lot of land of which the property leased by the emphyteutic lease formed part, " excepting " the lease made in favor of the Mill Vale Bark Extract Co.'y, " of the bark extract factory and *the land whereon the same is* " *situated and now leased to the said Company which is hereby* " *reserved.*"

Subsequently Maher made an assignment of his estate under the Insolvent Act of 1875, and John Fair, his assignee, authorized by the inspectors, conveyed to the Respondents the property mortgaged to them. The deed of conveyance contains the above reservation.

On the other hand Hobbs sold to the Appellant the rights under the lease which he had purchased at Sheriff's sale, and the Appellant has paid all the rent which has accrued since his purchase.

There is no difficulty that the Appellant is the owner of the property seized and the only questions are: 1st Is the Respondent the assignee of the rights of Maher under the emphyteutic lease ?

2nd If they be in the rights of the lessor, had they a right to attach for the damages claimed, the machinery which the Appellant has removed from the premises ?

From the terms of the mortgages by Maher to the Respondent, and of the conveyance by Maher's assignee, it would appear that the rights resulting from the emphyteutic lease have never been ceded to the Respondent. The reserve seems to exclude altogether not only the right to the rent, but also the property leased.

It is perhaps not necessary to decide that question in this case, for supposing that the Respondent were in the rights of

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the original lessors, these rights would only be such as could accrue under a lease, which both parties acknowledge to be an emphyteutic lease.

The emphyteutic lease is a species of contract quite different from an ordinary lease. Their rules are treated in two different chapters in the civil Code. The one applying to ordinary leases gives to the lessor a privilege, for the payment of the rent, and other obligations of the lease, on the moveable property found in the premises, (Art.1619 C.C.—Ferrière, Cout. de Paris, vol. 2. Art. 171, p. 1264, No. 3)—with the right to attach such property even after it has been removed, from the premises. (Art. 1624, C. C.) 2 Bourjon, Tit. 8, s. 5, dist. 2, § 1, No. 53.

The emphyteutic lease gives no such privilege, but merely the right to expel the lessee, if he allows three years to elapse without paying the rent. Art. 574, C. C.—Ferrière on Art. 171 of the Custom of Paris, vol. 2, p. 1237, No. 5. Bacquet, Droits de justice, ch. 21, No. 292.

Art. 163 of the Custom of Paris authorized a *saisie-gagerie* for perpetual rents due on houses situated within the City and suburbs of Paris. This privilege was denied in any other part of the territory subject to the Custom. The rent due on an emphyteutic lease is considered by the authors as of the same character as perpetual rents or *rentes foncières*, for which this privilege of *saisie-gagerie* did not exist outside of the City of Paris. (Ferrière on Art. 163, vol. 2, p. 1068, Glose 1st. No. 5.)

The judgment must therefore be reversed and *main levée* granted to the Appellant.

Judgment reversed.

Bëique & McGoun, for Appellants.
Ives, *Brown & Merry*, for Respondent

MONTRÉAL, 19 JANVIER 1882.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 205.

JEREMIE MONDOU,

Défendeur en Cour Inférieure,

APPELANT ;

ET

EDMOND QUINTAL,

Demandeur en Cour Inférieure,

INTIMÉ.

La Cour d'Appel n'infirmera pas un jugement, parce que sur une question de dommages, la Cour inférieure aurait accordé quelques dollars de trop.

DORION, J. C.—Le Défendeur, avec plusieurs autres, ont démoli une maison qui appartenait à l'Intimé et ils l'ont enlevée. Cette maison n'était pas d'une grande valeur puisque l'Intimé ne l'avait payée que $30. La Cour de première instance a condamné l'Appelant à payer $100 pour la valeur de la maison et $50 de dommages exemplaires.

Il est possible, et nous croyons, que la Cour de première instance aurait pu accorder beaucoup moins de dommages sans commettre d'injustice ; mais c'est là une question d'appréciation de la preuve qui est fort contradictoire, et nous ne croyons pas devoir infirmer un jugement parce que, sur une question de dommages, la Cour aurait accordé quelques dollars de trop.

Le jugement est confirmé.

Loranger, Loranger & Beaudin, pour l'Appelant.
Doutre & Joseph, pour l'Intimé.

MONTRÉAL, 22 NOVEMBRE, 1881.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 201.

LA BANQUE MOLSON,

Demanderesse en Cour Inférieure,

APPELANTE ;

ET

HARDOUIN LIONAIS *ès-qualité,*

Défendeur en Cour Inférieure,

INTIMÉ.

&.

LA SOCIÉTE DE CONSTRUCTION DES ARTISANS,

Tiers saisie.

JUGÉ :—Que le Tiers-saisi est tenu de mentionner dans sa déclaration, non pas seulement ce qu'il devait lors de l'émanation du bref de saisie-arrêt ou de la signification qui lui en a été faite, mais aussi les dettes devenues exigibles depuis, et que la saisie s'étend à tout ce qui est devenu dû depuis la signification jusqu'au temps de la déclaration du Tiers-saisi.

DORION, J. C.—La contestation est à l'occasion d'une saisie-arrêt sur un jugement obtenu par l'Appelante contre le Défendeur, Joseph Galarneau. Cette saisie-arrêt a été signifiée à la Société de Construction des Artisans, Tiers-saisie en cette cause, le 11 mars 1879, et au Demandeur le 12 du même mois.

Le 21 mars, la Tiers-saisie a déclaré que, lors de la signification du bref de saisie-arrêt, elle n'avait pas, n'a pas maintenant et qu'il n'est pas à sa connaissance qu'elle aura par la suite aucune somme d'argent, créance, meubles ou effets appartenant au Défendeur, sous la réserve des faits suivants, qu'elle soumet et sur lesquels elle déclare s'en rapporter à justice :—que par obligation du 12 mars 1879—Joseph Galarneau a vendu à la société Tiers-saisie un lot de terre à la charge de payer, le 7 décembre 1880, ou avant, si la chose était exigée, à l'acquit du vendeur, aux représentants de Henriette Moreau, de son vivant épouse de Hardouin Lionais, une somme de $200 ; que cette indication de paiement n'a pas été acceptée, mais qu'il est à la connaissance de la société que cette somme de $200 a été transportée par le Défendeur, ès-qualité, à Joseph O. Joseph, le 18 mars 1879, et que ce transport à été signifié à Joseph Galarneau, le 22 mars 1879.

Sur cette déclaration, la Cour Supérieure, par jugement

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du 17 octobre 1879, a condamné la Tiers-saisie à payer à l'Appelante la somme de $200 et les intérêts.

La Cour de révision a, le 25 octobre suivant (1879), infirmé ce jugement, en se fondant sur ce que, lors de la signification de la saisie-arrêt, le 11 mars 1879, la Tiers-saisie ne devait rien au Défendeur et qu'elle n'était devenue sa débitrice que le 12 de mars, en sorte que " *la saisie devait être considérée comme prématurée et frappant dans le vide.*"

L'Appelante appelle de ce jugement, et à part quelqu'irrégularité de procédure, toute la question consiste à savoir si la saisie-arrêt n'a eu l'effet d'arrêter entre les mains de la Tiers-saisie que les sommes qu'elle devait lorsque la saisie-arrêt lui a été signifiée, ou si elle a eu l'effet d'arrêter toutes celles qui sont devenues dues par elle jusqu'au moment où elle a fait sa déclaration.

L'art. 613 C. de P. dit que " la saisie arrêt est faite au moyen " d'un bref émanant du tribunal qui a rendu jugement, en- " joignant au tiers de ne point se désaisir des effets mobiliers ' qu'ils ont en leur possession, appartenant au débiteur, ni " des deniers ou autres choses qu'ils peuvent lui devoir ou " auront à lui payer, avant qu'il en ait été ordonné par le " tribunal, etc."

L'art. 616 C. de P. dit: " L'effet de la saisie-arrêt est de " mettre les effets et créances dont le Tiers-saisi est débiteur, " sous la main de la justice, etc."

L'art. 619 C. de P.: " Le Tiers-saisi doit déclarer les choses " dont il était débiteur à l'époque où la saisie lui a été signi- " fiée, celles dont il est devenu débiteur depuis, la cause de la " dette et les autres saisies faites entre ses mains."

La Cour de révision s'est fondée sur les termes de l'art. 613 du code de procédure civile et sur l'autorité de Roger, de la saisie-arrêt, no. 171 *bis*, qui dit :—" Mais lorsque le Tiers-saisi " ne doit rien encore au débiteur, *et qu'il ne vient à lui devoir " que postérieurement à la saisie-arrêt formée en ses mains, il " faut considérer cette saisie comme prématurée et frappant dans " le vide.*"

Il est bon de remarquer que ce passage ne se trouve pas dans la première édition du traité de Roger, et qu'il a été ajouté dans l'édition publiée après sa mort, par son fils, ce qui en diminue l'autorité.

D'ailleurs, c'est en fesant le même raisonnement, que plu-

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sieurs auteurs recommendables avaient enseigné que l'on ne pouvait saisir des salaires ou appointements non échus, parce que lors de la saisie-arrêt il n'était rien dû, mais la jurisprudence a repoussé cette prétention et il est maintenant parfaitement établi, tant en France qu'ici, que des salaires non échus peuvent être saisis arrêtés.

Il y a même un statut de la province de Québec qui, par une disposition expresse, permet de saisir-arrêter une proportion des salaires non échus des employés publics ; (38 *Vict.*, *ch.* 12, *s.* 1).

Quelle que soit l'autorité de Roger fils, elle ne peut prévaloir contre les décisions de la Cour de Cassation.

Or, ce tribunal a jugé, le 3 février 1820, en infirmant un jugement de la Cour Royale de Riom, qu'un saisi-arrêt de ce qui pourrait revenir à Philippe Courby dans la succession de sa mère, qui était encore vivante lors de la saisie, était valable, à l'encontre d'un cessionnaire à qui Courby avait cédé ses droits après la mort de sa mère. La Cour de Cassation a donné pour motifs de son jugement, que Courby n'avait pas,après le décès de sa mère, le droit de céder ses droits au préjudice de la saisie faite par l'un de ses créanciers, et que la Cour Royale de Riom qui avait décidé que la créance cédée n'avait pas pu être arrêtée parce qu'elle n'était pas due, et qu'elle aurait pu n'être jamais due, *avait méconnu les principes des saisies-arrêts.*

L'art. 619 du code de procédure civile veut que le Tiers-saisi déclare les choses dont il était débiteur à l'époque où la saisie lui a été signifiée, et celles dont il est devenu débiteur depuis. La saisie-arrêt met donc sous la main de la justice non seulement ce qui était dû lors de la signification du bref de saisie-arrêt, mais encore ce qui est devenu dû depuis et jusqu'à la déclaration faite par le tiers-saisi, et dès lors les sommes arrêtées cessent d'être à la disposition du débiteur insolvable, car tout débiteur dont les biens sont sous saisie est réputé insolvable, et il ne peut plus les céder au préjudice des créanciers saisissants.

C'est ce qu'a jugé la Cour de Cassation dans l'arrêt cité, et nous croyons que les principes sur lesquels elle s'est appuyée doivent être suivis dans cette cause-ci.

Deux question de procédure ont été soulevées par l'Intimé. La première, c'est que le bref de saisie-arrêt qui était rapportable le 24 mars, n'avait été rapporté que le 26. La seconde

que l'on avait omis dans le bref d'assigner la Tiers-saisie à venir déclarer ce qu'elle devait au Défendeur.

Quant à la première objection, elle n'est nullement fondée, puisque la Cour inférieure, dans le rapport des procédés fait par son greffier, déclare que le bref a été rapporté le 24 mars.

Quant à la seconde objection, il est vrai qu'il y a une omission dans le bref de saisie-arrêt, mais cette omission ne regarde que l'assignation de la Tiers-saisie qui n'a pas voulu s'en prévaloir, et qui a fait sa déclaration, comme si elle avait été régulièrement assignée.

Quel intérêt le débiteur saisi peut il avoir à contester l'assignation donnée au Tiers-saisi ?

L'on a cité Carré et Chauveau sur l'art 557 du code de procédure, mais ces auteurs sont obligés d'admettre, à l'endroit cité, que la jurisprudence est contraire à leur opinion.

Nous croyons que le jugement de la Cour de révision doit être infirmé et que celui de la Cour Supérieure doit être confirmé avec dépens.

RAMSAY, J.—The Appellant took out a seizure in the hands of "la Société de Construction des Artisans," to attach the goods, moneys, credits and effects the said society may have in its hands belonging, or due, or to become due to the said Defendant, H. Lionais, es qual. The writ then goes on to summon the said H. Lionais, es qual., to be and appear to hear the said attachment declared good and valid. There was no summons to the *Tiers-saisi.*

The writ was served on the *Tiers-saisi* on the 11th march, 1879, and on the Defendant on the 12th march. It was returnable on the 24th. By the return, it seems as though the writ was only returned on the 26th.

It seems, although not summoned, that the *Tiers-saisi* appeared and made a declaration to the effect that nothing was due by the *Tiers-saisi* at the time of summons; but on the day following (12th march), one Galarneau sold to the *Tiers-saisi* a certain property, to be paid for on the 7th december, 1880, "*ou avant, si la chose était exigée pour et à l'acquit du vendeur,*" to the heirs and representatives of the late Mrs. Lionais, a sum of $200 and interest. That there was no acceptance of this *indication de paiement*, but that the Respondent, es-

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qualité, had by notarial deed of the 18th, transferred the debt to Mr. Joseph, and that this transfer had been signified to Galarneau on the 22nd.

The Defendant did not appear nor plead to the sufficiency of the proceedings, or in any way contest them ; default was entered and judgment taken condemning the *Tiers-saisi* to pay the $200 to the Appellant. This judgment was of the 17th october, 1879.

On the 25th the Appellant appeared and inscribed the case in review, and raised three questions of form and one substantial reason for setting aside the judgment. The formal grounds are, (1) That he had no notice of inscription for hearing in the Court of first instance ; (2) That there was no summons to the *Tiers-saisi;* (3) That the writ was returnable on the 24th, and it was not returned till the 26th.

The first ground is readily answered. The case being by default, he was not entitled to any notice. The second is scarcely more difficult. Defendant was summoned, and he should have objected at once to the error in the writ if he had really any interest in raising the question, but now the writ having answered its purpose, he is too late in raising a question which does not affect him directly.

The third ground is more difficult. If the writ was only returned on the 26th, he has not had an opportunity to be heard, and he was entitled to that. No one can be deprived of his legal right to be heard without introducing a most dangerous laxity. A fair opportunity to be heard is a fundamental principle of justice, and courts cannot assume the responsibility of saying when it is important or not. In practice the right to be heard does not depend on whether one has anything to say that is worth hearing. If there is no opportunity to a Defendant to be heard and no unmistakable waiver, there is no *chose jugée* (C. C. P. 16.) The question, then, we have here to decide is whether as a fact the writ was not returned till the 26th. The articles of the C. C. P. referred to by Appellant have no application to this case. The non-return of the writ till the 26th renders the whole proceeding absolutely null, and there is no more need of a preliminary plea than if there had been no service.

But the Appellant adds that the certificate shows that it was returned on that day, but that this was a clerical error,

and that in fact it was returned on the 24th. I think this error may be shown, at all events when there is evidence from the record itself that there is error, and so we held in a recent case where the judge's entry of the *jurat* showed that the date was a clerical error,and that the affidavit was sworn to on the saturday and not on the sunday. Besides it is not properly matter of record contradictorily entered, but mere matter of docket. At most it is but the act of the Court and not of the party. In England such matters could be corrected *during the same term.* This admits the possibility of amending errors even in their rigid system. Under our law I think error may always be shown, and particularly where the error is of a third party. How does the proof stand here?

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On this last question I think we must suppose that the Court knew of its own entry, and the Superior Court not having determined that the return day was the 26th and not the 24th, it would be hazardous for us to decide that it was. The question on the merits on which the decision turned in the Court below is as to whether a seizure in the hands of a *Tiers-saisi* could be validly made so as to attach what is not due at the time of the seizure, but which became due owing to a liability which took its rise since the attachment was signified. The Judges in the Court of Review held, on the authority of a writer on the modern French law, that the attachment could only affect what was due on a debt already contracted when the attachment was signified.

I think we must look to the terms of our code, read by the light of the old law, rather than to the somewhat speculative views of writers on texts of law differing materially from our own. In the French Code of Civil Precedure there is no article similar to our art. 856. In that article the form of the writ implies that the attachment strikes all money, things or effects the *Tiers-saisi* has or may have belonging or due to the Defendant. Now, the Respondent wishes this to be restrained to the time of the service or issue (it matters not which) of the writ. In other words, the *Tiers-saisi* is not to say what is true at the time he answers, but what might have been true at the time the question was asked him. The object of this limited interpretation is to defeat the recourse of the creditor.

I cannot concur in this mode of dealing with the law, more

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particularly when it is clear that under the old law the *Tiers-saisi* has to declare, "what he was indebted at the time of the service of the writ upon him, and in what he has become indebted since that time," etc. There is no distinction here as to the period of the origin of the debt, and I cannot see, on general principles, why there should be any such distinction. It is a very striking form of expression to say "*il a frappé dans le vide*," but I don't think it is a very convincing one. It is an exclamation rather than an argument, I am of opinion that the judgment of the Court of review must be reversed, and the judgment of the first court sustained.

Judgment reversed.

Barnard & Beauchamp, pour l'Appelante.
Doutre & Joseph, pour les Intimés.

MONTREAL, 22nd NOVEMBER 1881.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 810.

THE MOLSON'S BANK,

Claimant in the Court below,

APPELLANT;

&

DAME VIRGINIE LANAUD,

Creditor and cessionnaire in the Court below.

RESPONDENT.

HELD:—1st That a warehouse receipt by the owner of the goods doing business as a warehouseman is valid, and the owner giving such receipt is put precisely in the same position as any other warehouseman.

2nd That the section 50 of the 33 Vict., cap. 5, which reads as follows "no cereal grains or goods, wares or merchandise shall be held in pledge by the bank for a period exceeding six months, (except by consent of the person pledging the same) &c.," does not imply that a bank shall forfeit its right of pledge by allowing the six months to elapse without selling the goods.

3rd That in the present case there was a repledging or consent given by the owner of the goods sufficient to secure a continuation of the pledge beyond the first six months.

RAMSAY, J.—This case comes up on the contestation of Appellant's claim against the estate of an insolvent. The bank appellant held two warehouse receipts granted by the insolvent to the Mechanics' Bank, and transferred to Appellant.

The validity of one of these receipts is alone contested,

being No. 22 of the record. It bears date 11th november, 1878. The Respondent, who is the wife of the insolvent, was not only a creditor of his estate, she was also *cessionnaire* of his estate under the insolvency, and undertook to pay 25 per cent on the unprivileged debt. Her contestation sets up that the amount due the bank is not $5,500 but the smaller sum of $3,538.20 by reason of payments made on account, and it is admitted that this is correct. She also says that she is only obliged to pay 25 per cent of this balance of $3,538.20 or $844.55, the said warehouse receipt being null, prescribed and extinguished more than six months before the insolvency. She also says that the transfer to Appellant from the Mechanics' Bank was subsequent to the insolvency of the latter, and that she has a right to set up against the Appellant what she could have set up against the Mechanics' Bank.

On these issues the case was heard, there being no difference as to the facts.

The Superior Court dismissed the claim on the ground that it appeared that the receipt was given by the insolvent, and that he was not a warehouseman, and that he could not give such a receipt and keep possession of the things.

It is quite evident by the facts relied on by both parties that the insolvent gave the warehouse receipt of goods in his own warehouse. It nowhere appears whether the insolvent was a warehouseman or not. There was no issue raised on this point, and the Respondent admits by part of her plea that the receipt, unless prescribed, is a warehouse receipt.

The particular wording of the judgment gives rise to some difficulty. It says: "*Ce dit failli* n'avait pas droit, n'étant pas une des personnes mentionnées dans le dit acte, de donner aucun reçu d'emmagasinage, tout en gardant la possession des marchandises." I think that the judgment goes too far, for it purports to decide a fact which is not in issue. But if it is intended to say that not being one of the parties mentioned in the act, the insolvent could not therefore give a receipt and keep possession of the goods, if it is intended to decide that no one can give a werehouse receipt, as warehouseman of his goods, then we have a new question and one of some moment.

Before proceeding to examine this second view, I may ob-

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serve that in the case of *Robertson and Lajoie*, this Court held that the parties signing the receipt could not pretend against a holder in good faith that the signers were not warehousemen. The dissent turned entirely on a question of pleading, and I do not understand there was any difference among the members of the Court as to the point now in question.

Now it appears that the Respondent is exactly in the position of the person who signed the receipt. She is the *cessionnaire* of the person who signed it, and her position of creditor is merged in that of *cessionnaire*. On the other point, we must have recourse to the statute, 34 Vict., cap. 5, sect. 48, and it seems to put the owner of the goods giving a warehouse receipt in precisely the same position as any other warehouseman so doing.

Then we come to the so-called prescription. The whole question turns on the effect to be given to sect. 50. "No cereal grains or goods, wares or merchandize shall be held in pledge by the bank for a period exceeding six months (except by consent of the person pledging the same)," (I presume in writing), &c. It is clearly intended that the bank shall sell, after notice of 10 days, within six months from the pledging. But what is the penalty of the bank allowing the six months to elapse? Respondent contends that it is the forfeiture of the right of pledge. On the other side it is contended that the bank can then be obliged to sell. I am at a loss to conceive on what principle it can be contended that the bank shall forfeit its pledge by not selling within the six months. It is vain to seek any guide from the history of the enactment or from its principle. There are evident reasons why a bank should not be allowed to hold the article pledged until it be reimbursed its advances, but I cannot see any reason for compelling the bank to sell perhaps to its own loss and to the detriment of its customer and of his creditors.

The question is only important in this case if the consent must be in writing. If there be no need of a writing, Robillard's acquiescence would certainly be presumed. But it seems strange to pretend that the failure to make a private writing of this sort should operate the loss of the pledge. It seems hardly necessary to say that if a written consent were necessary, the consent of the 28th may came too late. It was too late to keep alive the werehouse receipt, and it could not

be a new receipt, for then it would be for past advances. I am, therefore, of opinion that the receipt is not *prescribed*. It does not appear what Respondent could have validly opposed to a claim in the name of the Mechanics' Bank, so it is unnecessary to discuss the question as to how far the Respondent could set up any defence she might have to an action by the Mechanics' Bank. I fancy, however, it will be admitted that she could set up any equitable reason for a discharge.

Dorion, C. J.—I do not think it is necessary to consider in this case what would be the effect of a Bank holding for more than six months the goods pledged by the transfer of a warehouse receipt without obtaining a consent from the pledgor, and as far as I am now advised, I think there is considerable doubt, whether the effect of keeping such warehouse receipt more than six months, without the consent of the pledgor or without adopting proceedings to realise the security, would not be to deprive the Bank of its *lien* on the goods pledged, as to all other *boná fide* creditor.

Here,although the warehouse receipt bears date the 11 November 1878 and was probably transferred about that time to the Mechanics' Bank, we find that on the 5th of April 1879, before the six months were expired, Robillard wrote a letter to the Bank, wherein he declares that he deposits the warehouse receipts in question as security for the notes mentioned in the letter. The warehouse receipt was, when this letter was written, held by the Bank and the notes mentioned in the letter would seem to be original notes for which the transfer was made. Under these circumstances the letter of the 5th of April 1879 must be held to be a consent given by Robillard that the Bank should continue to hold the barley mentioned in the warehouse receipt of the 11th of November, and the six months could only run from the date of that letter. Again, on the 28th of May 1879 Robillard gave an express consent that the Bank should hold the barley as security for its debt. It has been said that Robillard could not give this consent, because he was then insolvent and he was put in insolvency on the 30th of May. There is no doubt that if the Bank had lost its *lien* when this consent was given, Robillard being in a state of insolvency could not have re-

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vived it. This would have been giving an advantage to one creditor over the others. But there is nothing in the law to prevent an insolvent from interrupting a prescription before it is acquired. This may be in the interest of all the creditors and will often prevent proceedings and costs which would be injurious to the estate. There is no more objection to a consent given by a debtor to prevent the prescription of a *lien* held by his creditor than there would be in renewing a note about to be protested or in waiving the necessity of a protest of a note endorsed by him, as this, if made in good faith, causes no prejudice to his other creditors.

I therefore consider that the letter of the 5th of April and the consent of the 28th of May 1879 were both sufficient to preserve the *lien* of the Bank on the barley mentioned in the warehouse receipt of the 11th of November 1878.

As to the question on which the Court below dismissed the action, that is that Robillard was not a warehouseman and could not grant a warehouse receipt it is sufficient to say that the law allows a warehouseman to give a warehouse receipt upon his own goods. It is in evidence here that Robillard had in his own store the barley for which he gave the warehouse receipt of the 11th of November 1878. The law does not define who is to be considered a warehouseman. Robillard acknowledged he was a warehouseman by granting several warehouse receipts. They were accepted in good faith by the Bank and it is not even pleaded that Robillard was not a warehouseman. Under these circumstances the *lien* of the Bank must be maintained and the judgment of the Court below reversed.

Judgment reversed.

MacLaren & Leet, for Appellants.
Doutre & Joseph, for Respondent.

MONTRÉAL, 19 JANVIER 1882.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 92.

DAME MARIE HONORINE BETOURNAY,

Défenderesse en garantie en Cour inférieure,

APPELANTE ;

ET

JOSEPH MOQUIN & AL.,

Demandeurs principaux en Cour inférieure,

INTIMES.

JUGÉ :—1o. Que les enfants ne peuvent réclamer le douaire créé par le mariage de leur père, qu'en renonçant à sa succession.

2o. Que le douaire coutumier existe non seulement sur les immeubles que le père avait lors de son mariage et qu'il n'a pas aliénés ; mais encore sur ceux qu'il a aliénés si la mère des douairiers n'a pas renoncé à son douaire, tant pour elle que pour ses enfants.

Les trois Intimés, Joseph Moquin et ses deux sœurs, ont porté cette action pour recouvrer un douaire coutumier.

L'Appelante appelée en garantie a contesté la demande principale en alléguant que les Intimés avaient accepté la succession de leur père, de sorte qu'ils ne pouvaient réclamer le douaire.

Elle a produit un acte de vente dans lequel les Intimés ont vendu avec les autres représentants de la succession de leur père, à Guillaume Racine, un immeuble dépendant de cette succession.

De plus, Adeline Moquin, l'une des Intimés, a pris la qualité d'héritière de son père dans un acte de partage de sa succession.

L'Appelante a aussi plaidé, que le père des Intimés avait, de son vivant, vendu l'immeuble sur lequel les Intimés réclamaient leur douaire et que, par la loi, ils ne pouvaient réclamer le douaire que sur les immeubles demeurés dans sa succession.

Les Intimés ont répondu à cette défense qu'ils avaient signé l'acte de vente en question, parce qu'ils avaient été induits en erreur par le notaire de l'Appelante, qui leur avait dit qu'ils pouvaient signer, sans que cela intervint avec leurs droits.

La Cour de première instance a jugé que les Intimés avaient prouvé les allégués de leurs réponses, et elle a déclaré nulle l'acceptation qu'ils avaient faite de la succession de leur

Dame Betournay & J. Moquin et al

père en signant l'acte de vente à Racine. Elle a rejeté la prétention de l'Appelante que les Intimés ne pouvaient réclamer leur douaire que sur les immeubles trouvés dans la succession de leur père à son décès, et elle a maintenu l'action des trois Intimés.

Adeline Moquin, l'une des Intimés, s'est depuis désisté du jugement rendu en sa faveur.

Dorion, Juge en chef :—Les trois Intimés ont pris la qualité d'héritiers dans la vente qu'ils ont faite à Racine, et il nous est impossible de dire qu'ils l'ont fait par erreur. Il n'y a pas de doute quant à Adeline Moquin, qui a non seulement signé la vente à Racine, mais qui a de plus accepté le partage de la succession fait, environ un mois après la vente. Les deux autres, et surtout Joseph Moquin, font voir qu'ils n'ont pas voulu accepté la succession, sans s'assurer s'ils n'auraient pas plus d'intérêt à y renoncer et que, lorsqu'il s'est agi d'assister à une assemblée de parents pour autoriser la tutrice à vendre par licitation l'immeuble acheté depuis par Racine, Joseph Moquin s'y est refusé et qu'il ne l'a fait que sur l'assurance que cela ne compromettrait pas ses droits. Il n'aurait pas compromis ses droits s'il n'avait fait qu'assister à l'assemblée de parents, mais c'est plus de quinze jours après cette assemblée qu'il a signé l'acte de vente sans, apparemment, y avoir été sollicité et rien ne fait voir qu'il ait été induit en erreur en le faisant. Ce n'est qu'après avoir signé cet acte de vente que les Intimés ont renoncé à la succession de leur père, pour s'en tenir à leur douaire. S'ils avaient renoncé avant de vendre, nous aurions plus facilement admis l'erreur. Mais lorsqu'ils ont signé l'acte de vente, ils n'avaient ni accepté ni renoncé à la succession ; ils délibéraient. En signant l'acte de vente ils ont manifesté l'intention d'accepter la succession. Il ne paraît pas même qu'on leur ait demandé de signer cette vente, et Joseph Moquin s'est de lui-même rendu chez le notaire pour le signer. Il peut se faire que les Intimés n'aient pas compris la portée de cet acte, mais ils ne l'ont pas prouvé et leur propre déclaration, faite après avoir signé, ne suffit pas pour établir l'erreur.

L'immeuble du Défendeur principal aurait été sujet au douaire, si les Intimés n'avaient pas accepté la succession de

leur père. L'Appelante s'est fondée sur la clause 53 du ch. 37 des Statuts Refondus du Bas Canada pour dire,que les enfants ne pouvaient réclamer leur douaire que sur les biens possédés par leur père à son décès ; mais cette clause n'avait pas reproduit exactement la section 37 de l'ord. d'enregistrement, 4 Vict. c. 30.

Par une omission,due au copiste sans doute, l'on avait omis les mots "aussi sur ceux" qui se trouvaient dans l'ordonnance. La clause du Statut, sans ces mots, devenait un nonsens et l'omission a été réparée par l'acte 25 Vict. ch. 11, s. 8, en sorte que les Intimés, sans leur acceptation de la succession, auraient été fondés à réclamer leur douaire, non seulement sur les biens sujets au douaire possedés par leur père à son décès, mais aussi sur ceux qu'il avait aliénés, sans renonciation au douaire de la part de leur mère, tel que permis par l'ordonnance et par les Statuts Refondus.

Cette question a été bien jugée par la Cour de première instance, mais nous sommes d'opinion d'infirmer le jugement, parce que les Intimés ont accepté la succession de leur père et qu'ils ne peuvent, tout à la fois, être héritiers et douairiers.

Il y a une autre difficulté dans la cause, c'est que les Intimés, qui avaient fait un acte qui emportait renonciation au douaire, auraient dû, par leur action même, demander la nullité de cet acte. Ils ne l'ont fait que par leurs réponses, ce qui n'est pas régulier. Lorsque cet acte leur a été opposé, ils auraient dû demander à amender leur déclaration. Ici cette objection n'a pas été soulevée et nous ne mentionnons ce fait que pour signaler une irrégularité qui aurait pu être fatale, si on l'avait invoquée et si nous ne décidions la cause sur une autre question.

Jugement infirmé.

Girouard & Würtele, pour l'Appelante.

Geoffrion, *Rinfret*, *Laviolette & Dorion*, pour les Intimés.

MONTREAL, 19 JANVIER 1882.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 190.

THE TRUST AND LOAN COMPANY OF CANADA,

Opposante en Cour inférieure,

APPELANTE;

ET

AUGUSTIN QUINTAL, ÈS-QUALITÉ,

Requérant pour nullité de décret,

INTIMÉ;

ET

DAME CATHERINE RAWLEY,

Demanderesse en Cour inférieure,

APPELANTE;

ET

AUGUSTIN QUINTAL, ÈS-QUALITÉ,

Requérant pour nullité de décret,

INTIMÉ.

JUGÉ:—Que l'acheteur qui, sur une vente par le shérif, a payé son prix de vente, ne peut forcer le créancier poursuivant le décret, qui a reçu le prix de vente, à le rembourser sous le prétexte qu'il est exposé à être troublé, et qu'il ne peut exercer de recours contre tel créancier que s'il est troublé dans sa possession.

DORION, Juge en chef.—Les Appelants dans ces deux causes se plaignent d'un jugement qui a annulé le décret fait sur le nommé André Monarque, à la poursuite de Catherine Rawley, et a condamné celle-ci à rembourser le prix de vente payé par l'adjudicataire avec dépens. Ce jugement a aussi condamné le Trust and Loan Company à payer les dépens de sa contestation.

Voici les faits: Un nommé Jean Gauthier s'est rendu adjudicataire de l'immeuble vendu sur André Monarque à la poursuite de Catherine Rawley, et ce pour une somme de $1510, et a plus tard subrogé dans ses droits Luc Quintal, en sa qualité de tuteur à ses enfants mineurs. Celui-ci a emprunté du Trust and Loan Company une somme de $2,000 pour payer le prix d'adjudication, et le Trust and Loan, ayant fait le paiement, a été subrogé dans les droits du bailleur de fonds. Le prix de vente a été distribué, et après déduction des frais privilégiés, la balance a été adjugée à l'Appelante Catherine Rawley, en paiement de sa créance.

Après que ces procédés furent terminés, Quintal a présenté

une requête à la Cour supérieure, par laquelle il a demandé la nullité du décret et le remboursement des deniers qu'il avait payés, sous le prétexte qu'il était exposé à être évincé, parce que la propriété vendue n'appartenait pas à André Monarque, sur qui la vente avait été faite, mais à Henri Goyette, qui l'avait vendue, il est vrai, à Monarque, mais par un titre nul.

The Trust and Loan Company of Canada & A. Quintal

Luc Quintal est décédé pendant les procédés. L'Intimé, nommé tuteur à sa place, a repris l'instance.

Des admissions ont été données pour établir la qualité des parties et, sans autre preuve que celle résultant des titres produits, la Cour de première instance a annulé le décret.

L'Intimé a complètement failli dans sa preuve. 1o. Il n'a pas établi qu'il fût exposé à être troublé. Si Monarque était propriétaire, l'adjudication est valable, et si c'est Goyette qui est propriétaire, il a ratifié la vente et ne peut troubler l'acquéreur. L'Intimé n'avait donc aucun intérêt à soulever cette question.

2o. S'il voulait faire annuler le décret, il devait se pourvoir avant de payer son prix d'acquisition. Il ne peut maintenant, sur le simple énoncé qu'il est exposé à être troublé, obtenir des créanciers qui ont touché les deniers le remboursement de son prix d'acquisition. Il ne pourra le faire que s'il est évincé.

Troplong, de la vente, examine cette question et dit au No. 614 : " Il nous reste à observer, avant d'en finir sur le " droit de l'acheteur de séquestrer le prix entre ses mains, " que ce serait en tirer une conclusion très fausse que de " prétendre que l'acheteur qui, ayant payé le prix, se trouve " en péril d'éviction, pourrait forcer le vendeur à le lui " rendre..

........." Tant que l'acheteur, qui a payé, n'est pas dépouillé " par un fait d'éviction consommé, toute son action se borne " à forcer son vendeur à prendre son fait et cause. Ce n'est " que lorsqu'il y a dépossession que s'ouvrent les répétitions " dont nous avons parlé en exposant l'art. 1630."

Ib. 10 al. " Je l'ai dit tout à l'heure avec le texte de la loi " romaine : l'acheteur qui a payé son prix ne peut le répé- " ter sous prétexte d'un danger d'éviction même imminent, etc."......

" Ce principe admis, suivons-en les conséquences, et suppo-

The Trust and Loan Company of Canada & A. Quintal

" sons d'abord que les créanciers inscrits se soient partagé le " prix. Je ne pense pas que la Cour de Metz puisse se refuser " à admettre que tous les périls du monde ne rendront pas " l'acheteur recevable à leur demander la restitution du prix."

Duvergier, vente, T. 1, No. 430 et suiv.

Aubry et Rau, T. 4, p. 397, disent également : " L'acqué- " reur qui a payé son prix ne peut, sous prétexte de crainte " d'éviction, en demander la restitution ; peu importe qu'il " l'ait payé au vendeur lui-même, ou qu'il l'ait versé au no- " taire rédacteur de l'acte de vente, chargé de le conserver en " dépôt jusqu'à l'accomplissement des formalités hypothé- " caires. Il ne pourrait même pas retirer le prix qu'il aurait " consigné en vertu des articles 2186 du Code Nap. et 777 du " Code de procéd."

Ces articles sont ceux qui permettent à l'adjudicataire de consigner pour purger les hypothèques.

C'est conformément à ces autorités et aux articles 1535 du Code civil et 717 du Code de procédure civile que les causes de *Hogan et Bernier*, 21 L. C. J., 101, et *Parker et Felton*, 21 L. C. J., 253, ont été jugées, et l'on peut voir aussi la cause de *Talbot et Béliveau*, 4 Rapports Judiciaires de Québec, 104.

Pour ces raisons nous sommes d'opinion que le jugement doit être infirmé, avec dépens en faveur des Appelants.

Jugement infirmé.

M. E. Charpentier, pour Catherine Rawley.
Judah & Branchaud, pour le Trust and Loan Co.
Geoffrion, Rinfret & Dorion, pour l'Intimé.

MONTREAL, 25 JANVIER 1881.

Coram DORION, J. C., MONK, CROSS, BABY, J. J.

No. 153.

DAME LOUISE NITHINGALE,

APPELANTE;

ET

LA SOCIÉTÉ DE CONSTRUCTION ST-JACQUES,

INTIMÉE.

JUGÉ :—Que la caution pour les frais en appel ne peut demander à la Cour de l'en décharger avant le jugement, à moins qu'elle ne se trouve dans l'un des cas prévus par l'article 1953 du Code civil.

DORION, Juge en chef.—Les cautions en cette cause demandent à être déchargées de leur cautionnement pour les frais à venir. Cette demande est faite du consentement de la Société Intimée. L'Appelante s'y oppose et prétend que les cautions sont obligées de la cautionner pour tous les frais de l'appel et ne peuvent se faire décharger, sans son consentement.

L'article 1953 C. C. dit que la caution, qui s'est obligée du consentement du débiteur, peut agir contre lui, même avant d'avoir payé, pour en être indemnisée, 1o. lorsqu'elle est poursuivie pour le payement; 2o. lorsque le débiteur a fait faillite ou est en déconfiture; 3o. lorsque le débiteur s'est obligé de lui rapporter sa quittance dans un certain temps; 4o. lorsque la dette est devenue exigible par l'échéance du terme sous lequel elle a été contractée, sans avoir égard au délai accordé par le créancier au débiteur sans le consentement de la caution; 5o. au bout de dix ans, lorsque l'obligation principale n'a point de terme fixe d'échéance; à moins que l'obligation principale, telle qu'une tutelle, ne soit de nature à ne pouvoir être éteinte avant un terme déterminé.

Cet article est semblable à l'article 2032 du Code Napoléon.

Troplong, dans son Traité du cautionnement, No. 410, dit que cet article du Code Napoléon est limitatif et que la caution ne peut demander à être déchargée que dans les cas qui y sont indiqués. Ponsot, du cautionnement, No. 274, paraît être de la même opinion. Pothier, des obligations, No. 442, dit: " Lorsque l'obligation à laquelle une caution a accédé, " doit par sa nature durer un certain temps, la caution ne " peut demander pendant tout ce temps que le débiteur prin- " cipal l'en fasse décharger. C'est pourquoi celui qui s'est " rendu caution d'un tuteur pour la gestion de sa tutelle ne

Dame Louise Nithingale & La Société de Construction St-Jacques

" peut demander au tuteur, tant que sa tutelle durera, qu'il " le fasse décharger de son cautionnement."

Ici les cautions se sont obligées, envers l'Intimée, de lui payer la dette et les frais dans le cas où le jugement de la Cour inférieure serait confirmé et que l'Appelante manquerait à les payer. Elles se sont donc engagées pour tout le temps que durerait l'appel, et s'il leur était permis de retirer leur cautionnement avant le jugement sur leur appel, il pourrait en résulter un préjudice à l'Appelante dont l'appel pourrait être renvoyé dans le cas où elle ne trouverait pas d'autres cautions.

L'autorité de Pothier est en tous points applicable à cette cause-ci, et les cautions, ne se trouvant dans aucun des cas prévus par l'article 1953 C. C., n'ont pas le droit de demander à être déchargées. L'Intimée peut bien les décharger, mais les cautions n'ont pas le droit de demander à la Cour de les décharger, ce qui serait mettre l'Appelante dans la nécessité d'obtenir d'autres cautions. La motion doit être renvoyée.

Motion renvoyée.

Robidoux & *Fortin*, pour l'Appelante.
Bëique, *McGoun* & *Emard*, pour l'Intimée.
Desjardins & *Lafontaine*, pour les cautions.

MONTREAL, 21 DECEMBRE 1880.

Coram DORION, J. C., MONK, RAMSAY, CROSS, J. J.

No. 262.

J. D. E. LIONAIS & AL.,

Opposants en Cour inférieure,

APPELANTS.

ET

THE MOLSON'S BANK,

Demanderesse en Cour inférieure,

INTIMEE.

JUGÉ :—Que l'opposant, qui appelle d'un jugement rendu dans une cause dans laquelle il n'était point le défendeur, n'est point tenu de fournir un cautionnement au delà des frais.

DORION, Juge en chef.—Cet appel est d'un jugement qui a renvoyé une opposition afin de distraire que les Appelants avaient faite à la saisie des immeubles du Défendeur, sur la poursuite de l'Intimée. Ils n'ont donné caution que pour les frais.

L'Intimée fait motion que l'appel soit rejeté, parce que les Appelants doivent être considérés comme s'ils étaient Défendeurs en cette cause et que leur opposition, ayant l'effet de retarder l'exécution du jugement obtenu par l'Intimée, ils devaient donner caution non seulement pour les frais, mais pour la dette. Elle a cité la cause de *Coutlée et Rose*, 6 L. C. J., 186, et celle de *Lamson et Würtele*, 3 Rev. de Législation, 107, dans lesquelles l'appel a été renvoyé par la Cour d'appel parce que le Défendeur, qui était opposant, n'avait donné caution que pour les frais et non pas pour la dette.

Mais, dans la cause actuelle, les Appelants n'étaient pas Défendeurs en Cour inférieure. Par leur opposition ils demandaient main levée de la saisie parce qu'ils prétendaient que le Défendeur, quoique administrateur de ces biens en vertu du testament de dame Henriette Moreau, leur mère, n'avait pas pu les engager à leur préjudice. Les droits qu'ils réclamaient étaient, par conséquent, distincts de ceux du Demandeur.

Les jugements cités, en supposant qu'ils seraient applicables, depuis le Code, à un opposant qui aurait été le Défendeur en Cour inférieure, ne peuvent s'appliquer aux opposants actuels. La motion est renvoyée avec dépens.

Motion renvoyée.

Doutre & *Joseph*, pour les Appelants.
Barnard & *Beauchamp*, pour l'Intimée.

MONTREAL, 19 AVRIL 1881.

Coram DORION, J. C., MONK, CROSS, BABY, J. J.

No. 135.

JEAN BAPTISTE THEOPHILE DORION,

Défendeur en Cour inférieure,

APPELANT ;

ET

CHARLES L. CHAMPAGNE,

Demandeur en Cour inférieure,

INTIMÉ.

Jugé :—Qu'une partie ne peut produire en appel une pièce qu'elle a omis de produire en Cour inferieure.

DORION, Juge en chef. L'Intimé fait motion qu'il lui soit permis de produire un bon signé par le Défendeur, qui a été mentionné en Cour inférieure, mais qui n'a pas été produit.

La procédure et le dossier ne peuvent être changés en appel. Cette Cour doit rendre le jugement que la Cour inférieure aurait dû rendre. Elle doit, par conséquent, procéder sur la preuve telle qu'elle a été faite en Cour inférieure. C'a été de tout temps la pratique de cette Cour et nous ne pouvons permettre à l'Intimé de changer le dossier en produisant une pièce qu'il a omis ou qu'il n'a pas jugé à propos de produire en Cour inférieure.

Motion rejetée.

S. Pagnuelo, C. R., pour l'Appelant.
W. Prévost, pour l'Intimé.

MONTREAL, FRIDAY, 18TH NOVEMBER 1881.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, J. J.

No. 138.

DAVID GRANT,

Plaintiff in the Court below,

APPELLANT;

&

THE HON. JEAN LOUIS BEAUDRY,

Defendant in the Court below,

RESPONDENT.

HELD:—1st That the notice of action given by Appellant (Plaintiff in the Court below), to the Respondent, is insufficient, and not such notice as is required by art. 22 of the Code of Civil Procedure.

2o. That the Loyal Orange Institution, in this case mentioned, is an unlawful association prohibited by ch. 10 of the Cons. stat. of Lower Canada, in as much as the members of said association are bound by an oath or agreement not authorised by law to keep secret the proceedings of the society.

3o. That the Respondent has acted in good faith and with probable cause, in causing the Appellant to be arrested on the 12th of July 1878, and is not liable in the damages claimed by the Appellant.

DORION, C. J.—This is an action in damages brought by the Appellant against the Respondent, for having as Mayor of Montreal and as a Justice of the Peace, caused him to be illegally arrested on the 12th of July 1878; and also for having caused two bills of indictment to be laid against him, before the Grand Jury, at the sittings of the Court of Queen's Bench, Criminal Side, in October 1878.

The Court below has dismissed the action, on the ground that the notice of action given to the Respondent was insufficient, as it did not state the place where the arrest of the Appellant had been effected and also, in not giving the names and residence of the Appellant's agents, advocates or attornies who had signed it.

The Appellant complains, by his declaration, that, on the 12th of July 1878, and for some time previous and after that date, the Respondent held the office of Mayor of the City of Montreal and was a Justice of the Peace, and that by an abuse of his authority, as such Mayor and Justice of the Peace, and in order to have him arrested, he procured one Lawrence Patrick Murphy to make a complaint under oath, at the Police Office, at the City of Montreal, that he the Appellant and other officers and members of the Orange

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Association, had unlawfully assembled for the purpose of walking in procession through certain public streets of the City, thereby provoking a breach of the peace and endangering the lives of the citizens, whereupon the Appellant was arrested without any reasonable or probable cause; that in persuance of the said abuse and prostitution of his authority, as Mayor and Justice of the Peace, the Respondent caused two indictments to be preferred against him and others, before the Grand Jury at the October sittings of the Court of Queen's Bench, 1878, the one for having on the 12th day of July previous, unlawfully assembled for the purpose of walking in procession through certain streets in the said City of Montreal with badges and emblems calculated to give offence, to excite hatred, and cause alarm, and well knowing that such assemblage would provoke a breach of the peace; and the other, for being a member of an unlawful society known as the Loyal Orange Association, of British North America, the members whereof are required to take an oath not required, not authorised by law, and bind themselves to an engagement of secrecy, not to divulge or communicate any matter, proceeding or thing had or transpired in open lodge to any person not being a member in attendance on some lodge of the Association, upon which indictments the Grand Jury having returned true bills the Appellant was exposed and had to submit to a trial on each of the said indictments, which resulted in his acquittal and discharge.

From this short analysis of the allegations of the declaration, it is evident that the Respondent is sued for what he has done in his capacity of Mayor of the City of Montreal and as a Justice of the Peace, and although he might have acted illegally, yet being sued for acts done in his official capacities, he was entitled to the protection due to public officers in the discharge of their public functions and had a right to a notice of the action, at least one month previous to the issuing of the writ of summons, as required by article 22 of the Code of Civil Procedure.

The Appellant has admitted the necessity of such notice by alleging that he had given it, and by producing in support of his allegations a notice in the following terms:

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DISTRICT OF MONTREAL } SUPERIOR COURT

DAVID GRANT, *Plaintiff*,

vs.

HON. J. L. BEAUDRY, *Defendant.*

To the Hon. J. L. Beaudry, Mayor of Montreal,

Sir,—We give you notice that David Grant, of the City of Montreal, salesman and trader, will claim from you personally the sum of ten thousand dollars damages, by him suffered from the abuse made of your authority, in causing his arrest illegally and for no cause, on the twelfth day of July last (1878), and that unless you make proper amends and reparation of such damages within a month, judicial proceedings will be adopted against you.

Montreal, 19th October 1878.

DOUTRE, BRANCHAUD & MCCORD,
Advocates f. Plff.

The Respondent, by his first plea, says, that this notice is insufficient in not stating the causes of action, the names and residence of the Appellant's attorney or agent, and in not even stating the place were the acts complained of were committed.

The article 22 of the C. of C. P. which requires this notice, is in the following terms:

Art. 22. "No public officer or other person fulfilling any " public duty or function can be sued for damages by reason " of any act done by him, in the exercise of his functions, " nor can any verdict or judgment be rendered against him " unless notice of such suit has been given him at least one " month before the issuing of the writ of summons."

" Such notice must be in writting, it must specify the " grounds of action, must be served upon him personally or " at his domicil, and must state the name and residence of " the plaintiff's attorney or agent."

The notice in the present case is addressed to the Respondent as Mayor. It contains nothing to indicate that the Appellant complained of any act done by him in his capacity of a Justice of the Peace, or in any other quality than as

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Mayor of the City of Montreal. Yet, it is evident from the allegations of the declaration as well as from the evidence in the cause, that the Appellant's action applies to acts performed by the Respondent partly as Mayor of Montreal and partly as a Justice of the Peace. The complaint mentioned in the notice is that Respondent caused the Appellant to be arrested while the allegation in the declaration is that he procured one Murphy to lay a complaint against him, upon which he was arrested, and subsequently indicted and tried. There is nothing of this in the notice.

The article of the code requires that the notice should state the names and residence of the attorney or agent of the Plaintiff signing it. The notice is not signed for the Plaintiff by his attorney or agent but by his *advocates* and neither their residence or office is indicated, although the notice is dated from Montreal.

These may be said to be mere technical objections, but it must be remembered that this notice is required for the protection of public officers who may in the discharge of their duties have acted illegally and it is for the purpose of enabling such officers to tender amends, if they think fit to do so.

The notice should therefore state with reasonable clearness the cause of action, so that the party complained of should know exactly what is the nature of the complaint and the circumstances which may add to or reduce his liability, in order that if so disposed he may tender amends proportioned to the injury he may have caused.

We are therefore of opinion that the cause of action was not sufficiently stated in the notice of action and that is a sufficient ground to confirm the judgment.

There may be more difficulty upon the purely formal objections taken to this notice, yet if the same strictness is exacted here as in England, there is no reason why it should not be,since our own provisions are derived from the English practice or jurisprudence, some of them would seem to be fatal.

There is nothing in the objection that the parties signing the notice have not given their names in full.—They have signed the names of their firms and this I apprehend is quite sufficient. *James & Swift*, 4 B. & C., 681, seems a case in point.

In *Taylor & Fenwick*, 7 T. R. 635, the notice thus signed; "given under my hand, at Durham, the 11th day of &c., Richard Radcliffe, attorney for, &c., was held insufficient for not indicating sufficiently the residence of the attorney or agent of the plaintiff." According to this ruling, the notice in the present case would be insufficient, for Messieurs Doutre, Branchaud & McCord although they have dated the notice they have given, from Montreal, as in the above case, they have not otherwise indicated their domicile. Moreover they have signed as "advocates" and not as attornies or agents of the Plaintiff, as required by the Code.

We do not wish to express a decided opinion upon these formal objections, but we cannot help remarking that it would be much safer in such notices to state the causes of action in the terms of the declaration which it is intended to serve on the party complained of and to follow strictly every requirement of the article of the Code.

Besides his plea of want of proper notice of the action, the Respondent pleaded, firstly, that on the 12th of July, 1878, the Appellant belonged to an illegal association called the "Loyal Orange Institution"; that he was arrested by virtue of a legal and regular process, when preparing to march in procession with other members of the Society, with the insignia of the Association; and that the Respondent was not responsible for his arrest. Secondly that the Appellant was arrested on a warrant of the Police Magistrate upon a complaint sworn to by Patrick Murphy, that he the Respondent consented to the issuing of the said warrant and that he did so under legal advice, that he had nothing to do with Murphy whom he did not even know by sight and that the Appellant had himself acquiesced in his own arrest, in order to submit to the Courts the question of the legality of the said Institution. Thirdly, that the arrest of the Appellant was under the circumstances legitimate, that the Respondent did not act without probable cause and with malice. These several pleas are followed by the general issue.

The Appellant replied specially to these several exceptions of the Respondent, the issue turning on the question whether the Orange Institution was an illegal society and whether the Respondent acted with malice and want of probable cause.

The Superior Court expressed no opinion on these questions.

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The parties, at the hearing have expressed a desire to have the views of this Court on these points and we see no objection to settle by our judgment all the points in issue.

The legality or illegality of the "Loyal Orange Institution" depends on the question whether the Association comes within the provisions of ch. 10 of the Consolidated Statutes of Lower Canada, entitled " An Act respecting seditious and unlawful associations and oaths."

Section 1st of this Act makes it a felony to administer or take certain oaths or engagements therein specified; and by section 6, it is provided "that every society or association " the members whereof are, according to the rules thereof " or to any provision or ageement for that purpose required " to keep secret the acts or proceedings of such society or " association, or admitted to take any oath or engagement, " which is an unlawful oath or engagement within the " meaning of the previous provisions of the said act, *or to " take any oath or engagement not required or authorised by " law, and every society the members whereof, or any of them " take, or in any manner bind themselves by any such oath or " engagement, or in consequence of being members of such society " or association; and every society or association the members " whereof or any of them take, subscribe or assent to any en- " gagement of secrecy, test, declaration not required by law;* " and every society, &., *shall be deemed and taken* to be unlaw- " ful combinations and confederacies.

2o. "And every person who becomes a member of any " such society or association, or acts as a member thereof,&c., " shall be deemed guilty of unlawful combination and con- " federacy."

By sect. 7, it is provided that any person guilty of any such unlawful combination or confederacy, and shall be convicted thereof upon indictment shall be imprisoned in the Provincial Penitentiary for a term not exceeding seven years, not less than two years, or be imprisoned in the common gaol or house of correction for any term less than two years.

The objects of the Orange Institution as disclosed by extracts of their general declaration would not bring the Association within the terms of the above enactments; but the oath or solemn declaration required to be made by every

person joining the Association or becoming a member thereof, begins as follows:

"I, A. B., do solemnly and voluntarily swear, &c.," and contains among others the following declaration:

"I further declare that I will do my utmost to support "and maintain the Loyal Orange Institution; obey all regu-"ar summonses and pay all just dues (if in my power) and "observe and obey the constitution and laws of the order; "and lastly I swear that I will always conceal and never in "any way whatsoever disclose or reveal the whole or any "part of the signs, words or tokens that are now about pri-"vately to be communicated to me, unless I shall be autho-"rised to do so by the proper authorities of the Orange Ins-"titution of which I am about to become a member. So help "me God, and keep me steadfast in this my Orangeman's "obligation."

The constitution and laws for the establishment, organisation and government of the association and of Local Lodges throughout the Dominion, provide in No. 38, that "any "member divulging or communicating any matter, proceed-"ing or thing, had or transpired in open Lodge to any per-"son not being an actual member in attendance on some "Lodge of the association under warrant... Or who shall "publish or cause to be published any proceeding of the "Lodge without the sanction of the Lodge or the Grand "Master given in writing, shall be deemed guilty of a viola-"tion of his obligation and shall be expelled or otherwise "dealt with, as a majority of the Lodge shall determine."

The oath or declaration required for the admission of members of the Institution and the above cited rules of the society are clearly within the letter of section 6 of the act, which declares every society or association the members whereof are required to keep secret the acts of proceeding of such society or association, or who take, subscribe or assent to any engagement of secrecy,test,or declaration not required by law, to be an unlawful combination and confederacy.

The Appellant, however, contends that the only object of the law was to prohibit societies organised for seditious and treasonable purposes, and that it cannot apply to the Orange Association, and he cites the title and preamble of the original ordinance, 2 Vict. C. 8, in support of his pretensions.

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Neither the title nor the preamble of this ordinance in any way, assist the Appellant. The object of the Council was no doubt to prevent treasonable and seditious practices and in order to do that, it has not only prohibited the organisation of societies for treasonable purposes and the administering of treasonable oaths, such as are mentioned in the first section of the ordinance but also the taking of all oath or engagement of secrecy not required, nor authorised by law and the formations of any association the members whereof were bound to keep their proceeding secret, which is the object of section 6. If the council had intended to forbid only such societies as were organised for seditious purposes, the first section of the ordinance which makes it a felony to join such society or to take an oath for any of the purposes mentioned in said section would have been sufficient, but it was no doubt considered that societies whose members were bound to secrecy by either an oath or a solemn declaration, might at any time be converted into dangerous associations, since their proceedings could not be disclosed by its members and on that account the council thought it necessary to forbid by section six, all such associations as by means of their secret organisation might become dangerous, as well as the taking of all oaths or solemn engagements not required and not authorised by law. To distinguish the two classes of offences, those under section six, constitute misdemeanors, while those under section one are punishable as felonies.

To show more clearly the intention of the law makers we find that in section nine of the ordinance and the same section of the Consolidated Statutes, societies or lodges of free-masons constituted under the authority of warrants granted by or derived from any Grand Master or Grand Lodge in the United Kingdom of Great Britain and Ireland are specially excepted from the operation of these enactments;—and in 1865, we find that the Parliament of the United Provinces of Upper and Lower Canada passed another statute (29 Vict. c. 46) to extend the exemption to other lodges of free-masons under the authority of a Grand Master or Grand Lodge of Canada.

We have therefore in a period extending over twenty-five years, three formal declarations of the Legislature to include in the prohibitions of the ordinance all secret societies even

those established for benevolent or charitable purposes, except the societies of free-masons when organised under authority derived from lodges established in Great Britain or in Canada and from no other source.

This authoritative declaration of the intention of the law, added to the terms of section six which are unambiguous, leaves no doubt in the minds of the majority of the Court that the Loyal Orange Institution is an unlawful society whose members are liable to the penalties imposed upon those who form part of unlawful combinations and confederacies prohibited by section six of the act.

We may here add that the ordinance of the special council has been taken almost verbatim from prior English Statutes and more particularly from the 37 Geo. III, ch. 123, and the 57 Geo. III, ch. 19, and that in England the provisions of these statutes have been held to apply to other associations than those indicated in the preamble and generally to all those societies, oaths and declarations, not specially excepted from their operation by sect. 26 of the last act. These exceptions comprise free-mason s lodges, declarations approved by two Justices, quakers meetings and meetings or societies for charitable purposes. 1 Russell, 4th Ed. pp. 186 to 191.

We are also of opinion that the Respondent did not act with malice and without probable cause, in the part he took in the proceedings against the Appellant, on the 12th of July 1878.

The Respondent was then Mayor of Montreal. The public mind had been greatly agitated by the announcement that the Orangemen had resolved to walk in procession through the streets on that 12th of July and that a collision was imminent between them and some of the Irish Roman Catholics. There had been meetings of the City Council and of the Justices of the Peace to devise means to secure peace and good order and no doubt the Respondent felt the great responsibility of his position; he caused five hundred Special Constables to be sworn and he consulted with several Queen's Counsel who advised him that the Orange Institution was an illegal association and that the members thereof had no right to walk in procession.

Acting upon this advice, the Respondent authorised the proceedings which were adopted to arrest the Appellant—

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whose commitment, indictment and trials were the consequence of his arrest without any further action being taken by the Respondent.

It is also to be noticed that before the Appellant's arrest the Respondent offered to protect him and the other members of the Association if they would go out without any banners and insignia and that in the whole of his proceedings he seemed to be animated but by the desire to maintain order and prevent a breach of the peace which seemed imminent.

We think therefore that there was no malice and no want of probable cause in the action taken by the Respondent and that under all the circumstances he was not liable in damages for the part he took in the arrest of the Appellant.

RAMSAY, J.—This is an appeal from a judgment dismissing an action of damages brought against the Respondent, Mayor of Montreal, in 1878.

The declaration sets out the existence of an Orange Association, called the Loyal Orange Institution, in Montreal; the Appellant was a member of this association; that the association determined "to meet as a body on the 12th of July, 1878, at their ordinary place of meeting, in the morning, and then and there to form in procession, with marshals or officers, decorated with the insignia or distinctive marks of office, to direct the march of members so formed in procession, from the place of meeting to a church chosen for the worship of the said members, in the said City of Montreal, and there to participate in religious offices consonant with the form of worship and the object of the meeting of the said members"; that it became known to the members of this association that evil-disposed persons would meet in large number, with the avowed object of committing a breach of the peace, by assaulting, beating, and otherwise illtreating, and perhaps murdering, the said Plaintiff and his said fellow-members with the object of preventing this procession; that the Appellant and his associates applied to the authorities for protection, and specially to Defendant, who was then Mayor of the City of Montreal, and a Justice of the Peace, "and that the said Defendant refused to adopt any means of protection as requested to do;" but, on the contrary, that he

connived at the proceedings of the persons who threatened Appellant and his associates, and organised a body of men, five hundred in number, as Special Constables, falsely pretending that it was for the purpose of keeping the peace; that on the 12th of July the Respondent assembled these Special Constables with the avowed object of preventing the Plaintiff and his fellow-members from going in procession to church; that the Special Constables so assembled on the 12th of July threatened and put in jeopardy the lives of the Respondent and of his associates, and he, the said Appellant, was, by command of the Respondent, arrested and prevented from going to church with his fellow-members. That the Appellant, in order to justify his proceedings, obtained one Murphy to make complaint before a magistrate that the Orange Association was an unlawful society, that Appellant was a member of it, and that the association had met that day with the intention of marching through certain public streets, thereby provoking to a breach of the peace; that on this complaint a warrant was granted, and the Appellant arrested as aforesaid. The declaration then relates that to avoid further imprisonment Appellant was obliged to give bail; that owing to the influence of Respondent he was committed for trial, and had to renew his bail, and finally that he was indicted and tried, owing to the machinations of Respondent. Finally, that he was acquitted. That by all these proceedings Respondent "has maliciously caused to Plaintiff considerable damages," which he estimates at $10,000, and Appellant further alleges that he has given Respondent notice of this action.

It will be at once apparent that this is not an ordinary action for false imprisonment, but that the Respondent is charged with acts of non-feasance, as well as with mal-feasance, in the discharge of his duties as Mayor of Montreal and as a Justice of the Peace, and that the false arrest is only an incident of this wrongdoing. He is accused of having not only improperly refused his authority to protect Appellant, but having exercised it to oppress and even imprison Appellant, and cause him to be unjustly indicted.

There is no doubt in my mind that such an action will lie. (See the case of Kennett, Lord Mayor of London in 1780, 5 C. & P. 282; and *Rex* v. *Pinney*, 3 B. & Ad. 953; also *Rex* v.

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Neale, 9 C. & P. 43.) And I can only express astonishment that having brought such an action, and persisted in it Appellant should now maintain that Respondent is not entitled to notice as a person fulfilling a public duty or function. The whole burthen of Appellant's complaint is that Respondent did not do his duty as Mayor, but unlawfully and maliciously, as Mayor, caused him to be prosecuted and arrested.

I would here make one other general remark on this case: that it is evidently one of those actions in which malice and want of probable cause must be combined before the Defendant can be condemned. He might be acting beyond the scope of his jurisdiction, and unless he did so knowingly he must be absolved, so far as the action complains of the legal proceedings; this was decided in 1786 in the case of *Johnstone* & *Sutton* (1 T. R. 545.) Lords Mansfield and Loughborough distinguished cases of trespass and manifest wrong-doing from arrest on process. They then went on to say: "A man, from a malicious motive, may take up a prosecution for real guilt, or he may from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action." See also, in 1833, *Mitchell & Jenkins*, 5 B. & Ad. p. 588; and, in 1839, *Porter* v. *Weston*, 5 Bing. N. C. 715.) The law, as laid down in the case of *Reg.* v. *Neale*, appears to me to recognize the same principle in so far as regards that portion of the action which is based on the alleged short-comings of the Mayor.

Now, before proceeding to examine the evidence, there is one fact which strikes one forcibly on reading the declaration, and it is that, by the very acts of which Appellant now complains, Respondent secured him the protection that he so urgently and directly required at his hands, and preserved him from being assaulted, beaten, ill-treated, and possibly murdered. Of course, this does not completely repel the idea of the existence of malignity in Mr. Beaudry's mind. It is possible he may not have desired the immediate slaughter of Mr. Grant, but rather that he should be preserved as a subject for his malice. Such refinement will not, however, be readily presumed; and when a Court perceives that a man in the position of Mayor of a municipality so exercises his functions that a beneficial result is attained—a result specially beneficial to the complainant—it will be slow to arrive at the

conclusion that malice is the main-spring of his actions. It has also been urged that the Mayor should have taken active proceedings against those who threatened the Orangemen. I fancy there never has been a doubt that those who threatened the Orangemen formed an unlawful assembly; but the reason why the Mayor did not attempt to arrest them or disperse them by force is fully explained by the Appellant's own witnessess, and particularly by Mr. Paradis, the chief of police, who, in answer to the question, "if twelve men are going to attack six, is it against the six or the twelve you would take precaution?" says, "if we can persuade the six not to expose themselves, we do so, *but there is no comparison between an affair of five or six and an affair of thousands.*"

Turning to the evidence of Appellant for special proof of this malice, we find it totally wanting. Nay, more, it seems to me that Appellant has exercised some ingenuity in establising that no such malice existed. It is impossible for any candid person to read the evidence without arriving at the conclusion that the Mayor was actuated by no other motive than that to which he swears when he says, p. 51, "I declare that I acted as Mayor, to the best of my abilities, in maintaining the peace, to prevent bloodshed." This is fully borne out by the evidence of Alderman Mercer, by Abraham Mackey, and, I think, by another witness, who prove the perfect fairness of the *Witness* report of what took place between the Mayor and the Appellant on the 12th. By that report, it appears that after the Mayor had been most peremptorily and, I may say, almost authoritatively, assured that the Orange Association was illegal, he implored Appellant to abandon the procession, and finally told him of the proceedings to which recourse would be had, namely, his arrest, if he persisted.

There is only one point on which it appears to me Appellant's strictures are founded, namely as to the formation of the body of Special Constables. The magistrates acted very properly, under the circumstances, in refusing to swear in as a Special Constable any member of a secret association. To say the least, it is infortunate that they had not exercised their discretion so as to prevent so large a number of Irish Roman Catholics from being sworn in, considering the occasion. I may also add that it is not usual to swear in a body

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of Special Constables drawn from the class to which these people seem to belong—an unknown throng in the street. Special Constables are generally selected from among people whose position in society compensates, in some measure, for the lack of long training and discipline. The evil of failing to observe this rule was apparent from the beginning, and several well-established breaches of the peace lead to the conclusion, that the safety of the town was not alone confided to this organisation. It is proper, however, to observe that Mr. Beaudry did not interfere directly in the selection of the Special Constables. One other point deserves notice. Appellant insists in his evidence on the fact that Mr. Beaudry tried to prevent the Government sending a military force to aid in keeping the peace. But when we come to examine this it turns out that Mr. Beaudry wished the Government to send the regular troops under its command, and he disapproved of sending militia, most of whom, he feared, were Orangemen. This was not an unnatural apprehension, and some little facts to which he refers show that it was not altogether groundless. Perhaps, if Mr. Beaudry had been examined on the question, he might have told us that a mixed force would have given him still graver cause of apprehension.

There being no malice established by the witnesses, I think the cause of action fails, unless we can deduce malice as a necessary conclusion from the evident illegality of the Mayor's acts.

Now, how does this stand? The Mayor was obliged to act under the circumstances in the performance of his duty. This obligation arises from the nature of his office, and his authority to take proceedings and to swear in Special Constables, or to take any other necessary means to preserve the peace, is not dependent either on a vote of the City Council or on any particular statute. His obligation and his authority result from the common law. He was not only in the commission of the peace, but as Mayor of the City of Montreal he was a Magistrate. Preparing to perform his duty, he took counsel of no less than four advocates of the highest standing, and all through he acted with, if not *under*, the sanction of counsel. Of course bad advice does not become good because it comes from counsel, but it is to be observed

that what the Mayor has to establish is not that his act was legal, but that he had probable cause for doing it. The opinion of counsel has always been of great weight in judging as to the probability of the cause.

Another presumption as to the existence of probable cause arises from the fact that the grand jury found bills on the information. This is not conclusive, but it goes strongly against the action, unless it can be shown that the grand jury were improperly influenced, which is alleged, but is not proved.

Passing from this to the merits of the advice on which the Mayor acted, it is hardly possible to say that it was unsustainable. And here I must stop to allude to a reference made to my charge to the grand jury at the term of the Court of Queen's Bench held in September, 1878. It will found, on examination, that I never expressed the opinion that the orange order was an illegal association. Those who know its organization might draw this conclusion from my exposition of the statute, but it was impossible for me then to state whether it was illegal or not, as I did not know the details of its organization. What I then said, to avoid misconception, I shall repeat.

" Having read to you the statute, and having explained in less technical language its general import, the Court trusts you will have little or no difficulty in discriminating whether any case presented to you, appears to fall fairly within the scope of the law or not. You will observe that it is not your duty to decide on the merits of the law, or whether it may be exceptionally or unduly severe. Neither are you to arrive at any conclusion unfavorable to the accused, or the reverse from any preconceived opinion as to the nature of an Orange Lodge, or the objects of an Orange Society. Before sending any one here for trial, it is your duty to have reasonable *prima facie* proof that an Orange Lodge is illegal under the Act, and that the accused is a member of it." (See 1 Legal News, p. 479.)

On referring to the interpretation of our act as given by me on the occasion referred to, I see nothing to alter, and if I do not repeat textually what I then said, it is because I think I can make the matter more clear if I apply that interpretation to the points raised in the discussion before this Court.

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Our ordinance of the 2nd Vict. is borrowed from three acts of the reign of George III.—37, cap. 123; 39, cap. 79; and 52, cap. 164. Though borrowed from the statutes, there are differences, on which it is not necessary to enlarge. The words of our statute are perfectly clear, and they extend to every society or association whatever, "the members whereof shall, according to the rules thereof, or to any provision or any agreement for that purpose, be required to keep secret the acts of proceedings of such society or association." It is impossible to deny, and it is not denied, that these words cover every association bound to secrecy by an engagement purporting to be an oath, or otherwise. But it is sought to limit their scope in practice by invoking the preamble. But the preamble does not, as was pretended, limit the enactments following; it gives the reasons, two in number, for these enactments. It says, in effect, that there are seditious and traitorous combinations, *and* there are societies and associations of a new and dangerous character, "inconsistent with the public tranquility, and with the existence of regular Government, therefore all secret societies are forbidden. This is not such an unreasonable conclusion as to entitle us to say that the legislative will was other than the words of the law import. So far as cases on the English Statutes can be authority, they seem to uphold the view now taken. (See *R.* v. *Lovelass*, 6 C. & P. 596, and *R.* v. *Dixon*, 6 C. & P. 601.)

We next come to the question of whether the Orange Association come within the terms of the law. Its members are sworn, and they are therefore under the most formal engagement to obey its rules, and one of the rules, No. 15, makes secrecy a distinctive part of the organization. It seems to me to be unnecessary to pursue the enquiry further. It is no answer for the violation of a direct prohibition of the law to say, "our motives were good; we are really organized in support of the Government."

Having arrived at this conclusion, our duty ceases. We have no special mission to point out to our fellow-subjects the expediency of this or that line of conduct; we have only to tell them of its legality. We have not to warn them of the absurdity of a contest, on the real merits of which both parties are thoroughly agreed. The one are Jacobites by

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their sympathies, the other are Orangemen; but it is more than likely both would fight to the death against a despotic form of Government. This is a truth which will be fully recognized some day or other, but in the meantime I notice it without the slightest hope of its being accepted, for we are much more guided by our feelings than by our reason. But the feeling as to the color of a ribbon or a flower is only a prejudice, a vulgar prejudice, not really entertained by anyone of education. Some people in a higher position may affect to sympathise with such follies, but in reality they only laugh in their sleeve at such of their dupes as beleive in them.

I had almost overlooked the question of notice. I think it must be clear that under the action as drawn Mr. Beaudry was entitled to notice. I also think the notice insufficient. It did not specify the grounds of the action. At most it only alluded to one, the false imprisonment, and that most imperfectly.

I would confirm the judgment of the Court below, for the reason given, and on the merits, as believing the arrest of the Appellant and all the proceedings of which he had any cause to complain were carried on without malice and with sufficient cause.

Monk, J.—I concur in the decision of this Court, confirming the judgment of the Court below. The notice of action, to my view, is not according to law; it does not comply with the requirements of the statute. I also think the Respondent acted in good faith, without malice, and upon the whole facts of this case as proved, it appears to me he was justified in the course he took towards the Appellant and those who were acting with him at the time. The reasons for this view of the case have been fully discussed by other members of the Court. There is, however, an additional point in the case on which the other members of the Court have expressed a very decided opinion and in regard to which I have the utmost hesitation in concurring with my learned colleagues, and that is, as to the illegality of the Orange organization itself. I confess I have great difficulty in believing that the

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consolidated statute, chap. 10, which is plainly declaratory, has any application to this association. It seems to me that in order to bring it under the operation of this law, a criminal or unlawful intent should be shown that the very design, necessary result and tendency of the society should be unlawful or criminal. This I do not find in their bylaws or the declared object of the organization. To argue that because a certain number of persons form themselves into an association, and engage with and to each other that they will defend with their lives the British Constitution, that they will, if necessary, make any sacrifice—will do all in their power to uphold the Throne of Queen Victoria, and die for their Sovereign, they are in violation of the statute above referred to, this seems to me a matter strange view of the law, and certainly is a most tyrannical and absurd abridgment of what is called british liberty. It is true that the idea and the origin of the society may have arisen in times of hostility between parties in Ireland. It may be that this extraordinary zeal for the safety of the monarchy, this devoted patriotism for their country and loyalty to the Queen are rather exagerated—may not be necessary and in fact perhaps somewhat ridiculous, but all these facts and considerations, do not render the association unlawful or criminal; and when Courts of Justice are called upon to find and inform and send people to the Penitentiary, there should be the clearest provision of law for such a course. The great difficulty seems to be that the members engage not to divulge their sentiments or their objects as stated above—but the fact is in this case, there is no secret to keep, it is pretty well known by every one what the object of the association is. It is quite true that certain members of the association may occasionally commit unlawful acts—they may act in a way, either as individuals or in body, to disturb the peace and may be guilty of other unlawful acts, but that does not result directly or necessarily from the object or intent of the society. If this statute applies to Orangemen as it is contended, we might as well say that a number of gentlemen organize and meet together and engage, or pledge themselves and even swear that they will observe the law of the land, or to abide by great moral law, they should be on account of their pledge not to speak of their intention, sent to prison or to the Penitentiary? I think this

would not be maintained, and therefore, I hesitate to concur in the view taken by the majority on this point. David Grant & The Hon. J. L. Beaudry.

Judgment confirmed.

Doutre & Joseph, for Appellant.
S. Bethune, *Q. C.*, Counsel.
Rouër Roy, *Q. C.*, for Respondent.
E. Carter, *Q. C.*, Counsel.

MONTREAL, 28 AVRIL 1882.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, Juges.

No. 242.

TÉLESPHORE E. NORMAND,
Défendeur en Cour inférieure,
APPELANT;

ET

CLÉOPHAS BEAUSOLEIL,
Demandeur en Cour inférieure,
INTIMÉ.

No. 271.

CLÉOPHAS BEAUSOLEIL,
Demandeur en Cour inférieure,
APPELANT;

ET

TÉLESPHORE E. NORMAND,
Défendeur en Cour inférieure,
INTIMÉ.

Le nommé Godin, failli, a fait un arrangement avec ses créanciers par lequel il a obtenu une extension de délai, en fournissant le cautionnement de l'Appelant pour le quart de la somme due. L'Appelant a consenti à devenir la caution de Godin, à la condition que celui-ci déposerait chaque samedi, durant un an, à la Banque Ville-Marie, un certain montant à intérêt au nom de l'Appelant *in trust*, ce dernier ayant le droit de retirer le dit argent et de le payer en à-compte d'endossements qu'il avait donnés pour garantir son cautionnement. Cette convention eut lieu entre l'Appelant et le failli hors de la connaissance des créanciers, qui n'en furent informés que lors de la faillite de leur débiteur. Ces dépôts ont été régulièrement faits par Godin jusqu'à l'époque où il fut mis en faillite. Aujourd'hui l'Intimé, syndic à la faillite, réclame le montant de ces dépôts de l'Appelant, qui les a retirés de la banque et s'en est servi pour diminuer d'autant sa responsabilité vis-à-vis des créanciers de Godin.

JUGÉ : — Infirmant le jugement de la Cour inférieure, (Monk et Ramsay, J. J., *dissentientibus*) 1o. Que la convention entre Godin et l'Appelant est légale et nullement entachée de fraude ;

2o. Que le cautionnement de l'Appelant ne devant prendre effet que dans le cas où Godin ne paierait pas lui-même, et le dépôt étant tout simplement un gage entre les mains de l'Appelant, l'Intimé ne pourrait le réclamer qu'en déchargeant l'Appelant de son obligation.

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CROSS, J.—In November 1878 Godin, a trader of Three Rivers became embarassed, he exhibited to his creditors a statement of his affairs shewing that he had a surplus of assets over his liabilities to the extent of $6.000. They signed a written agreement giving him an extension of time to meet his then liabilities, accepting in terms thereof his promissory notes for instalments at four, eight, twelve and sixteen months, those falling due at the last date being endorsed by the Appellant Normand. To induce Normand to become his security Godin agreed to deposit weekly in the Banque Ville-Marie $75 to the credit of Normand in trust, which he Normand was authorised at any time to draw and apply in payment of the paper he had so endorsed for Godin. This agreement was reduced to writing and was made known to Godin's principal creditor who took a leading part in getting the extension of time sanctioned by the other creditors.

The extension was obtained.

Godin continued to make his payments until July 1879, by which time he had deposited to the trust fund in Normand's name $2,007.87, but having had to succumb to the then prevailing depression, he was, in July 1879, put into insolvency, whereupon Normand withdrew the monies so placed to his credit in trust in the Banque Ville-Marie and employed them to liquidate the notes he had so endorsed for Godin, but the sum being insufficient for that purpose, he was obliged to contribute about $2,000 of his own means to take up the endorsed notes in question.

Beausoleil, who was appointed assignee to Godin's estate, by the present action, claims the amount of the deposit Normand had so drawn from the Banque Ville-Marie, treating it as the property of the Insolvent Godin, and as a fraudulent preference obtained by Normand out of Godin's estate. The Court below sustained Beausoleil's action for the capital, but did not include in the condemnation the interest allowed by the bank on the deposit.

Normand has appealed from this decision to obtain the reversal of the judgment against him, and the dismissal of the action, and Beausoleil has appealed, claiming that his judgment should be augmented by the amount of the interest which the bank allowed.

I can see no illegality in the agreement made between

Godin and Normand, nor any fraud, nor even a preference. On the statement on which Godin made terms with his creditors, he had at the time a surplus, a fact which has not been disputed. The creditors by their agreement with him in effect consentented to his being considered solvent, consequently with the power to deal with, and to dispose fairly of his own estate.

As being solvent, it was quite competent for him to bargain with a person to become his surety, and even to give that person a consideration for becoming such surety. The obligation of that surety, was not that in any event he should himself pay without reference to Godin's estate; but that Godin would himself pay out of his own estate, and that if he failed to do so, he the surety would make good the deficiency which Godin had failed to pay by his own exertions, with his own means, and out of his own estate. When Normand undertook to be surety, he had confidence that Godin would be able to pay his then creditors, by his own exertions, and out of his own estate; his creditors exacted the further guarantee that he should secure to them the last payment by a good endorser. In becoming that endorser Normand did not relinquish the right to secure himself out of Godin's estate while Godin had the power and the right to deal with that estate, and to the extent to which he fairly had that power; he consequently stipulated for a gradual pledge of part of that estate by the deposit in question, which was quite valid so long as Godin remained solvent and had a right to dispose in a legitimate way of his assets. It was no diversion of any part of his estate from his creditors, and his surety who was gaining nothing by his suretyship, had as much a right to protect himself, as any creditor had to get paid his principal, while he, Godin, had control of his estate and was solvent, and the act itself did not make him insolvent. Godin was quite entitled to provide his surety with a guarantee against the possibility of misfortune on his part, that is against the chances of his becoming insolvent, before he had paid the debts for which he had obtained an extension of time. He did so happen to become insolvent before he had paid these debts in full, but the payments he made on account before his insolvency were valid and in good faith; so up to that time were the monies

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by him pledged by way of deposit with Normand to serve as his guarantee. Had any of these deposits been made on the eve of his insolvency, these might have been impugned on the ground *of* preference, but this pretension has not been raised, and it does not appear that the facts would justify it.

It is contended that Godin had no right from the first to make this contract of pledge with Normand and under it to deposit the monies he did, and that his doing so was a fraudulent preference over his creditors, but manifestly, if he had the free disposal of his estate, the contract of pledge he made with Normand was a valid contract within his competency, and the monies he deposited under it up to the time of his insolvency were validly disposed of, and cannot now be claimed by his assignee Beausoleil.

Again the creditors with whom Godin compounded cannot be his only creditors, he continued his business and had other subsequent creditors with whom he did not compound. It is the interest of these subsequent creditors that Beausoleil more particularly represents, and among whom the greater part of the monies would be distributed that world be recovered from Normand if the judgment against Normand should stand, but surely there can be little pretext for saying that the deposits in question were a preference as regards these subsequent creditors and manifestly if not even a preference as regards the earlier creditors they could be none as regards the later, as well might it be contended that the monies paid on account to the first creditors were a preference as regards the later ones. If Godin at the outset had no right to contract with, and deposit money with his surety, he had no right to make any payments to any of his creditors, the one as well as the other was equally prejudicial to his posterior creditors.

I do not lay much stress upon the fact of Godin's creditors being made aware of the nature of his contract with his surety at the time it was made, save as shewing his good faith; altho it is actually in proof that a number of them were informed of it, especially Mr Linton, his principal creditor, who took the most active part in procuring the creditors' consent to the extension of time.

For the reasons mentioned I am of opinien that the judgment of the Court below in favor of Beausoleil the assignee is

erroneous and should be reversed, and that his action should be dismissed, consequently that Beausoleil's appeal demanding an augmentation of his judgmeut should be dismissed; and that being the view taken by majority of the Court, it is ordered accordingly, with costs against Beausoleil, assignee, in both Courts. T. E. Normand & C. Beausoleil.

TESSIER, Juge :—Les faits ayant été fort bien expliqués par le savant juge qui m'a précédé, mon intention n'est pas de les répéter, et je passerai donc tout de suite au mérite de la cause.

La première question qui s'élève est de savoir : si cette convention entre Godin et Normand est légale, nulle ou annulable.

Quelle est la nature de cette convention ? c'est le contrat de gage d'après les articles 1966, 1968, 1969 du Code civil.

L'article 1969 dit : " Le gage confère au créancier le droit " de se faire payer sur la chose gagée par privilège ou préfé- " rence aux autres créanciers. "

L'art. 1970 : " Le privilège ne subsiste qu'autant que le " gage reste en la possession du créancier ou d'*un tiers con-* " *venu entre les parties.*" C'est le cas actuel.

Ce contrat est permis ; il peut être annulé s'il y a fraude, s'il n'y en a pas il est parfaitement valable. Il est l'accessoire de l'acte d'indemnité que la caution peut exiger (Pothier, Obligations, No. 440).

D'abord étant fait six mois avant la mise en faillite, il ne tombe pas sous le coup des nullités de l'acte de faillite ; il tombe sous le coup des règles du droit civil en pareille matière.

Pour qu'il y ait fraude il faut donc une preuve que Normand et Godin ont fait cette transaction pour frauder les créanciers.

1o. Le principal créancier, Linton, admet qu'il en a eu connaissance et l'a approuvée ; cela ne veut pas dire qu'il a pu ainsi lier les autres créanciers, mais cela ôte l'idée et l'intention de fraude. Autrement Linton, le principal créancier, aurait donc participé à cette fraude.

2o. Ce dépôt a été de fait remis aux créanciers qui en ont profité, quoique par l'entremise de la caution Normand.

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3o. La nature du *simple cautionnement*, c'est que la caution paiera si le débiteur ne paie pas ; ce dépôt des deniers du débiteur a servi à payer les créanciers, c'est un but naturel et légitime. Les créanciers ne peuvent dire : " la condition a " été que la caution paierait le tout de ses propres deniers, " ce n'est pas là la nature du cautionnement ou de l'endossement.

4o. A l'époque de ce cautionnement le débiteur n'était pas en faillite ; l'état de faillite est créé par le statut, c'est une condition statutaire ; les créanciers n'ont pas voulu le déclarer en faillite, ils ne l'ont déclaré que six mois après.

Faillite, *banqueroute et déconfiture* ne sont pas synonimes. Ce débiteur n'était pas en banqueroute, parce qu'il faut fraude pour créer la banqueroute ; il n'était pas en déconfiture ou insolvable, parce qu'il avait plus d'actif que de passif ; cela ne l'eût pas aidé pour empêcher la faillite statutaire, parce qu'un homme peut être mis en faillite par la seule suspension de paiement, quoique son actif excède son passif. Il n'en est pas ainsi de l'état de déconfiture, d'après le droit ou Code civil, un homme n'est pas en déconfiture ni insolvable, si son actif excède son passif.

Or trois des créanciers de Godin jurent comme témoins qu'ils le considéraient comme solvable et qu'ils lui ont fait de nouvelles ventes de marchandises, c'est conclusif. Godin n'était pas alors insolvable. Son état d'affaires montrait un surplus de $13000.

Quant à la raison que le syndic a droit de reprendre le gage, oui, mais en le dégageant et déchargeant le gagiste de son obligation, c'est-à-dire en déchargeant la caution Normand. Ce n'est pas demandé. Je suis donc d'avis de maintenir cet appel et renvoyer la demande, avec dépens dans les deux cours.

Quant au second appel, celui du syndic, il doit être rejeté avec dépens.

Jugement infirmé.

Lacoste, *Globensky & Bisaillon*, pour Normand.
Geoffrion, *Rinfret*, *Dorion & Laviolette*, pour Beausoleil.

MONTREAL, 19TH JANUARY 1882.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 223.

DAME ANN BAIN,

Plaintiff in the Court below,

APPELLANT.

&

THE CITY OF MONTREAL,

Defendant in the Court below,

RESPONDENT.

HELD:—1st That under the 37th Vict. ch. 51 sect. 192, the Council for the City of Montreal is not bound to cause new permanent footpaths to be made at the same time throughout all the streets of the City, but may do so gradually as required in the different streets.

2nd That the cost or a proportion of the cost of such footpaths, as may be determined by the Council, is to be paid by the owners of real estate according to the frontage of their respective property and not in proportion to the cost of the portion made opposite each property.

DORION, C. J.—This is an action instituted by the Appellant (plaintiff in the Court below), to recover a sum of $2,085.50, which she alleges to have paid, by error, on account of a larger amount claimed by the City, under a special assessment for a flag stone sidewalk laid in Dorchester and St. Catherine streets.

The City Council is authorized by section 192 of the 37th Vict. ch. 51, (Quebec) "to order by a resolution, the construc-" tion of sidewalks made of stone, or asphalte, or both together " or of any other durable and permanent material, to the " exclusion of wood, in the City, and to defray the costs of " said works and improvements out of the City funds, or to " assess the costs thereof, in whole or in part, as the Council " may, in their discretion deem proper upon the prorietors, " or usufructuaries of the real estate situate on each side of " said streets, public places, or squares, in proportion to the " frontage of the said real estate respectively, and in the " latter case, it shall be the duty of the City surveyor to " apportion and assess, in a book to be kept, by him for that " purpose, the costs of the said works or improvements or " such part thereof, as the Council may have determined " should be borne by the said proprietors, or usufructuaries, " upon the said real estate, according to the frontage thereof, " as aforesaid; and the said assessment when so made and

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" apportioned shall be due and recoverable, as all other taxes " and assessments, before the Recorder's Court."

Acting under this authority the City Council, on the 31st of May 1875, adopting the reports of the road and finance committees, recommending the construction of permanent sidewalks, in certain streets, ordered that a flagstone footpath or sidewalk be constructed on both sides of St. Catherine street, from Bleury street to Guy street and of Dorchester street from Union Avenue to the City limits, the costs to be paid one half by the Corporation out of the loan for street paving and permanent sidewalks, and the other half by the proprietors or usufructuaries of real estate on each side of such streets by means of a special assessment in proportion to the frontage of their properties respectively. This flag stone sidewalk was constructed and the estate Charles Philipps, represented by the Appellant, being the owner of large properties fronting on both streets was assessed to pay a sum of $1,965.26 for her share of the improvement on St. Catherine street and of $1,292.76, for Dorchester street, as her one half share of the cost of said improvement in proportion to the frontage of her property in the two streets. Both assessments were made on the 27th of January 1877. In the course of the years 1877 and 1878, the Appellant paid the sum she now claims and which includes a sum of $269.59 for interest, a portion of which was charged at the rate of 10 *per centum per annum*.

The Appellant, by her declaration, contests the validity of the special assessment on four grounds:

1st That at the time the City caused the sidewalks to be constructed in front of her properties she had good, serviceable and permanent sidewalks, which were removed by the Corporation without accounting or making any allowance for the same.

2nd That the resolution or order *of the Council* was too indefinite in as much as it did not determine the kind of stone, the width of the sidewalk or the quality of the work.

3rd That there is no provision in the statute allowing the new sidewalks to be introduced gradually so as to pay one half of the new sidewalks, while the proprietors in other streets were wholly provided with sidewalks out of City funds, without any contribution on their part.

4th That the assessment had been based on an illegal principle in as much as more has been charged the Appellant than the cost of the sidewalk in proportion to the frontage of her said properties, she having been called to pay her proportion of the cost of the sidewalk throughout the whole of Dorchester and St. Catherine streets, instead of the cost of the sidewalk actually laid in front of her properties.

The Appellant has failed to establish her first ground of objection to the assessment. She has not proved that she had good and permanent footpaths in front of her pro perties, nor that the materials removed to be replaced by flagstone had any value; and if she had these materials which formed part of the improvements in public streets, they did not belong to her, but to the City, as the public streets do.

The second objection does not challenge the right of the City to order the construction of stone sidewalks that were made, but merely the form of the order. If the objection had been taken before the sidewalks were made or before she had paid for them, there might bave been something to say in support of it, but the Appellant did not protest against the making of the new footpaths; but, on the contrary, after they were made and completed, she paid for them without protest or reserve. After having derived all the benefit occurring from the improvement she wants to get back the money she has voluntarily paid for it, on the plea, that she did not know of some technical objections to the form of the proceeding, which are not proved to have affected, in the least, the merit of the order or resolution nor caused her any prejudice. There is no law to justify such a pretension. Payment is a waiver of all such objection and it is impossible for the Appellant to prove error in such a case, and yet error is the only basis on which the money she has paid could be recovered from the City. (Art. 1048 and 1140, C. C.; Aubry & Rau, t. 4, p. 730; Larombière, t. 2, sur l'art. 1376, C. N. Nos. 2, 30).

That the City Council could not order that permanent sidewalks be constructed gradually as required in particular streets, but must be constructed throughout all the streets of the City at the same time, is such an extraordinary proposition, that unless there is a positive law to that effect, it can-

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not be entertained for a moment. The provision under which the improved footpaths were made, leaves it to the council to determine when and how these improvements will be made and the Appellant has sanctioned the discretion which they have exercised by paying her share of such improvements.

The Appellant has also failed to prove that the assessment had been made on a wrong principle or that she had been made to pay more than her proportion of the cost of the improvement according to the frontage of her properties. The statute does not say that the proprietors of immoveable property shall pay the cost or a proportion of the cost of the improvement made in front of their properties; but the cost of the works shall be assessed and borne by the proprietors in proportion to the frontage of their respective properties, which is very different.

There would be no assessment required, if each proprietor was to pay the cost or a proportion of the cost of the improvement in front of his property.

The second branch of the objection, that is that the Appellant has been made to pay more than the proportion of the cost of the improvement according to the frontage of her properties, is not borne by the facts. On the contrary, it appears that although in one or two instances there were permanent footpaths which were not replaced the owners of the lots in front of which these portions of permanent footpaths existed, were made to contribute as the others to the whole improvement in proportion to the frontage of their properties, thereby lessening the burthen of those who like the Appellant derived the benefit of a new footpath throughout the whole front of their properties.

The Appellant's demand has been rejected except as to a sum of $30.36 overpaid for interest and this Court is of opinion that the judgment of the Court below ought to be confirmed with costs against the Appellant.

Ramsay, J.—The statute in question confers a special power on the Corporation of the City of Montreal to substitute permanent footpaths, of other materials than wood, instead of

the wooden footpaths usually made. The question is whether the Respondent has acted within the scope of the power thus conferred. It is said that the Corporation had no power to make the new footpath partially, but was obliged to make permanent footpaths all over town simultaneously; that the resolution was not sufficiently explicit, and that the directions of the road committee to supplement the resolution, not being sanctioned by a resolution of the Corporation, were valueless.

The former of these objections is based on a grievance which is more theoretical than real. It is contended that if the permanent footpaths are to be made over a portion of the cost of the new footpaths, they will be twice taxed for their own stone footpath, in proportion to their frontage, and for the wooden *trottoirs* of others. This is true as far as it goes, but it is impossible for the Court to arrive at the conclusion, that, because of this minute inequality, the legislature meant to impose a condition which, if possible, would ruin either the Corporation, or the proprietors, or both. But were it otherwise it would hardly entitle Appellant to succeed. She seeks to recover back money she has paid for this improvement, and in which, consequently, she has acquiesced. If she were to gain her suit, she would retain the advantages of an exceptional improvement, for which she ought to pay, for nothing.

The complaint that the resolution is not sufficiently precise is tolerably vague. There is no end to the detail conceivable. Something must always remain for exceeding, which no precision could cover, and I don't think that the resolution in question leaves any doubt as to what the Corporation required to be done. The objection seems to be that one width of flagstones was to be laid down in St. Catherine street, and another width in Dorchester street. Of which order does the Appellant complain? If it was too narrow in one street, her action was to have the flagging made wider, at a greater cost; if too wide in the other, her action was for a reduction. Her action is based on no consideration of the kind. There was still another grievance—the assessment was illegal.—Proprietors who had permanent pavements were called upon to pay for the new pavements. Of

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the Appellant cannot complain, for the footpaths before her property were all of wood, I am of opinion to confirm.

Judgment confirmed.

Barnard, Beauchamp & Creighton, for Appellant.
Rouër Roy, Q. C., for Respondent.

QUÉBEC, 8 FÉVRIER 1882.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 72.

MICHAEL CLARKE,

APPELLANT;

ET

L'HONORABLE ALEXANDRE CHAUVEAU ET AL.,

INTIMÉS.

JUGÉ:—1o. Que le juge des sessions de la paix a juridiction sommaire contre ceux qui commettent l'offense de monter, *étant armés*, sans permission et illégalement, sur un navire dans le port de Québec, en vertu de l'acte de 1873, 36 Vict., ch. 129, s. 86.

2o. Que dans l'espèce actuelle le bref de prohibition ayant été refusé par un juge de la Cour supérieure, il n'y a pas lieu, par un appel à cette Cour, de réviser cet ordre.

3o. Que le requérant n'a pas montré, par des affidavits suffisants, les circonstances qui lui donnent lieu de se plaindre de la sentence et d'aucune détention en vertu de cette sentence, et que l'affidavit en termes généraux du procureur *ad litem* du requérant ne suffit pas. (*Diss.* Dorion, J. C., et Ramsay, J. — (Extrait du "Quebec Law Reports," mars 1882).

SIR A. A. DORION, C. J.—This appeal is from a judgment denying a writ of prohibition to restrain the Judge of Sessions of the Peace, at Quebec, from executing a conviction by which he has condemned the Appellant to be confined for five years in the provincial penitentiary, for having gone, on the 9th of September 1880, he being armed, on board of the ship *Cavalier*, without the permission and consent of the master.

The Appellant was tried and convicted, in his absence, under "The Seamen's Act, 1873 (Canada), on the following summons:—

Canada,
Province of Quebec,
District of Quebec,
City of Quebec.
} POLICE COURT.

"To MICHAEL CLARKE, of the city of Quebec, in the district "of Quebec, laborer; whereas information on oath hath this "day been laid before the undersigned Judge of the Sessions

" of the Peace in and for the city of Quebec, for that you, on the " ninth day of September instant, at the harbour of Quebec, " in the district of Quebec, unlawfully did go on board the " ship or vessel the *Cavalier* whereof Mathew Jackson was " and still is master, the said ship or vessel being at a quay " or place of her discharge to wit: at the quay called *Ellis* " *Wharf* in the city and port of Quebec, without the permis- " sion and consent of the said Mathew Jackson, master of the " said ship or vessel, the said Michael Clarke not being an " owner, agent of owner or consignee of the said ship or " cargo, or any person in the employment of them or any " officer or person in Her Majesty's service or employment, " harbour-master, deputy harbour-master, health-officer, " custom-house officer, pilot, shipping-master or deputy ship- " ping-master, the said Michael Clarke being armed at the " time of committing the said offence against the form of the " Statute in such case made and provided.

" Whereby and by force of the said Statute, you, the said " Michael Clarke have, on conviction of your said offence, " incurred a penalty of imprisonment in the penitentiary for " a period of five years.

" These are therefore to command you in Her Majesty's " name, to be and appear on the fourteenth day of September " instant at ten o'clock in the forenoon, at the Court House, in " the said city of Quebec, before me the said Judge sitting at " the Police Court therein, or such Justices of the Peace in " and for the said district, as may then be there, to answer " to the said information and to be further dealt with accord- " ing to law.

" Given under my hand and seal, this twelfth day of Sep- " tember in the year of Our Lord one thousand eight hundred " and eighty-one at the said city of Quebec, in the district " aforesaid."

(Signed),

ALEXANDRE CHAUVEAU, *J. S. P.*

Section 86 of the Act which is the only one bearing on the conviction, is as follows:

" 86. No person (*other than* any owner, agent of owner, or " consignee of the ship or cargo, *or any person in the employ-* " *ment* OF EITHER OF THEM, or any officer or person in Her

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"Majesty's service or employment, harbour-master, deputy "harbour-master, health-officer, custom-house officer, pilot, "shipping-master, or deputy shipping-master) *shall go and be* "on board of any *merchant-ship* arriving or about to arrive "from sea at the place of her destination before or previous "to her actual arrival in dock, or at the quay or place of her "discharge, or while she remains in port, *without the per-* "*mission and consent of the master* OR PERSON IN CHARGE OF SUCH "SHIP; and if any person (*other than aforesaid*) goes on board "any such ship before or previous to her actual arrival in "dock, or at the quay or place of her discharge, or while she "remains in port *without the permission and consent of the* "*master* OR PERSON IN CHARGE OF SUCH SHIP, he shall for every "offence, be subject to imprisonment in the penitentiary for "any period not less than two years nor more than three "years, *if such person be unarmed at the* time of committing "the offence; *or five years*, IF SUCH PERSON BE ARMED WITH "OR CARRIES ABOUT HIS PERSON ANY PISTOL, GUN OR "FIREARM, OR OFFENSIVE WEAPON *at the time of commit-* "*ting the offence;* and *for the* BETTER SECURING *the person* of "such offender, the master or person in charge of the ship "*may take* any person so offending, as aforesaid, *into custody* "*and deliver him up* forthwith to any constable or peace- "officer to be by him taken before any Judge of a County- "Court or any Stipendiary-Magistrate, Police Magistrate or "Judge of the Sessions of the Peace, TO BE DEALT WITH "ACCORDING TO THE PROVISIONS OF THIS ACT."

This first part of this section concluding with the words "at the time of committing the offence," makes it an offence punishable by not less than two nor more than three years confinement in the penitentiary for any person, not being one of those specially excepted, to go on bord a *merchant-ship* without the permission and consent of the master or person in charge of such ship, and by five years, if such person be, at the time, armed with any pistol, gun, fire-arm, or offensive weapon, but it does not state before what tribunal the offence shall be tried. The last part of the section authorises the master or person in charge of the ship to take the offender into custody, in order that he may be brought before a Judge of a County-Court, or a Stipendiary-Magistrate, or Judge of

the Sessions of the Peace *to be dealt with according to the provisions of the Act.*

This last provision has evidently been taken from section 13 of the Consolidated Statutes of Lower Canada, ch. 55, and a similar provision is in the Imperial Act, 17 and 18 Vict., ch. 104, s. 237. It does not give to the officers named, the authority to try the persons so brought before them; but suggests that there are other dispositions made in the Act, for that purpose. The Consolidated Statute and the Imperial Act just referred to, the first in sect. 16, and the second in sect. 518, both contained provisions to that effect, but there are none in the Seamen's Act of 1873. Section 114 merely applies to the recovery of penalties and to the imprisonment to which the offenders may be liable in connection or in addition to a pecuniary penalty, which is the sense in which the word penalty is there used—and the jurisdiction in those cases is given to any Justice of the Peace. It cannot be supposed that the legislator intended to give to any single Justice of the Peace, all through the country, the right to try and condemn, to five years imprisonment, any person, who, by accident or otherwise, might go on board of a ship without having first obtained the permission or consent of the master, when by section 87, it is provided that a smaller offence can only be tried by a County-Court Judge, Stipendiary-Magistrate, Police-Magistrate, or Judge of Sessions.

This last section (87) has been invoked to show that the intention was to subject to the same mode of trial the offences committed under section 86. If such was the intention, why was not the same form of expressions used? — and why is it that in the three sections 86, 87 and 89 dealing with cognate offences, a reference to the trial only is made in the first, the mode of trial is provided in the second, while no mention of it is made in the third? It cannot admit of a doubt, that under the 89th section a person can only be convicted by a Jury. If the contention of the Respondents was well founded, we would arrive at this singular result, that an offender could not be sent to jail for sixty days under section 89 without being tried by a jury, while for an offence of the same character, he might be sent to the penitentiary for not less than five years, by a County-Court Judge or a Judge of Ses-

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sions under section 86. The whole of these clauses, as well as sect. 114, seem to require revision, in order to make them consistent.

But let us suppose that under the last part of section 86 a Judge of the Sessions could try the offenders therein mentioned, his jurisdiction would be limited to the case of persons arrested by the master or person in charge of the ship, and brought before such Judge of Sessions. It could not be extended to other cases, as jurisdiction cannot be given by inference. The Appellant would not come under that category, of the cases mentioned in that section, for he has neither been taken into custody nor brought before the Judge of Sessions. He was merely charged of the offence by a summons issued under the Summary Proceedings Act, 32 and 33 Vict., c. 31, s. 1, and what is more extraordinary he was convicted in his absence.

The French version has been relied upon to sustain the conviction, but it adds nothing to the English text and if it did, I presume that for obvious reasons, in a criminal matter, the English version should prevail; unless it were shown to contain some evident mistake.

If leaving the statute, we examine the complaint and summons on which the conviction took place, we find that there is no offence charged. It is not stated, in the terms of the law, that the *Cavalier* was a merchant-ship, nor that the Appellant was not in the employ of *either* of the persons excepted from the operation of the enactment, nor that he had no leave from the person in charge of the ship, but merely from the master, without saying that the master was in charge of the ship, at the time, nor that the Appellant was armed with or carried about his person a pistol, gun or firearm, or offensive weapon, a description of which should have been given in the complaint.

In a matter like this, where the punishment can not be less than five years, I am not disposed, even if I felt that I was permitted by law to do so, to extend, by way of interpretation and by doubtful inferences, the jurisdiction of the Judges of the Sessions of the Peace, so as to deprive any accused from the invaluable privilege of being tried by his peers, especially when I find that in England where these laws are admin-

istered by men well versed in the practice and with the principles of the criminal law, an advantage which we do no always possess here, the penalty for similar offences, under the Act already cited, is three months imprisonment, and the extreme punishment which a Stipendiary-Magistrate can in any case inflict is a penalty not exceeding £100 or imprisonment for a period not exceeding six months (17 and 18 Vict., c. 104, ss. 237, 518 and 519). If the Legislature wishes to abolish the trial by Jury in any particular case and to leave the citizens to be tried by an exceptional tribunal, especially when their liberty for such a period as five years may be in jeopardy, it must say so in clear and unmistakable terms ; — and I shall not deem it my duty to assist in such a work by any decision which is not clearly justified by the very letter of the law. I find no such justification in this case and I would therefore have allowed the writ of prohibition on both grounds ; 1st that the Judge of Sessions had no jurisdiction under the Act, even if the offence had been properly stated, and 2ly because, as I read the complaint, there is no offence charged. However, as my learned colleague on my left (Mr. Justice Ramsay) and myself are alone of that opinion, the judgment of the Court below will be confirmed.

RAMSAY, J.—After what has fallen from the Chief Justice, it is not perhaps necessary for me to say anything ; but the case is one of so great public importance, as affecting the liberty of the subject, the statutory provision before us is so dangerous and exceptional that it appears to me to be a duty to draw attention to it, so that the Legislature may not unwittingly leave such a monument of barbarism longer on the statute book. Section 86 of "The Seamen's Act of 1873" is in the following words :

86. No person, &c. (See *ante* p. 227).

In short, if any one, save any one of the persons enumerated, goes on board a merchant-ship before it arrives or when it is lying in port, without the consent of the master or person in charge of such ship, he shall "for every offence" be subject to imprisonment in the penitentiary for any period not less than two years nor more than three years, or five years if such person be armed. So if a merchant's clerk goes

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on board the wrong vessel by mistake, he may, and if the law is one which should be executed, he ought to be sent to the penitentiary for two years, and if, by chance, he had a pistol in his pocket, for five years. Criminal intent to give character to the innocent act was far beyond the ken of the modern Draco to whom we owe this law.

If such a law had been decreed in Russia, there would have been a shriek of indignation at its barbarity. That it passed through both Houses of Parliament unobserved, and, at all events, unconsidered, is more than likely. It is one of the inconveniences of printing that it permits and encourages the reproduction of rubbish to such an extent, that it is almost as hard to discover what one desires to see, as it is to find the proverbial needle in the bundle of straw. The author of this section, however, deserves some share of the immortality which belongs to those reckless legislators who are willing to destroy the liberties of the people for the gratification of a whim. Providentially, his execution is as faulty as his conception is dangerous. I do not allude to the general absence of precision, denoting total ignorance of the mechanics of law-making, which this section exhibits, or to its grammatical construction. I refer to the last words of the section which declare that " the person so offending is to be taken before any Judge of a County-Court or any Stipendiary-Magistrate, Police-Magistrate, or Judge of the Sessions of the Peace, *to be dealt with according to the provisions of this Act.*" Now, we are invited to declare that these words oust trial by Jury, and place the liberty of any person accidentally going on board the wrong ship at the mercy of two Justices of the Peace, or of a Stipendiary-Magistrate. It is not contended that these words are those ordinarily used for conveying jurisdiction ; but, if I understand the Respondent's pretention, it is assumed, that some of the dispositions of the Act are of a character so contrary to the general spirit of criminal legislation, and to the institutions of this country, that we must be more readily disposed toadmit it to be the intention of the Legislature to create a new jurisdiction, than if the law were of a usual character.

Such a doctrine appears to me to be intolerable. A monstrous law, which, in its eagerness to reach the guilty, confounds innocence and guilt, has no spirit, and its operation

must be confined to the narrowest interpretation of its words. Michael Clarke & L'Hon. Alex. Chauveau et al.

In the present case it is agreed that Section 87 gives almost a similar jurisdiction to the same magistrates as those mentioned in section 86, and therefore we should infer, it was the intention of the Legislature to give the jurisdiction in prosecutions under section 86. I think the inference is directly the other way. One form of words being used in one section and another in the other, the rule of interpretation is that it was intended to convey different ideas. I therefore say that the words "to be dealt with according to the provisions of this Act" are to be made coherent by supposing that the duty of the magistrates is to commit for trial as in the case of any misdemeanour.

Our attention was drawn to a case of *Trimble & Cullen.* It is a very meagre report. It does not pretend to give the words of any of the Judges, and I am inclined to think any of the three learned judges who sat in that case would be unwilling to have it supposed that a jurisdiction of a totally novel kind could be given "impliedly." What they probably said was that although not given in the usual and technical manner, the intention of the legislature to give it was sufficiently expressed in words though in a careless and slovenly manner.

The peculiar qualities of the legislator who drew this clause seem to have passed to those who have attempted to put it in force. The case before us in no respect follows the Act: (1) There is no negative averment that the Appellant did not belong to the very limited privileged class who may go on board without the permission of the captain or person in charge of the ship; (2) it is not alleged that the person in charge did not give permission; (3) it is not stated that the ship was a merchant-ship; (4) the accused was not brought before the Magistrate. There was, then, neither jurisdiction over the person or over the subject matter. The Magistrate might have as well passed sentence on the President of the United States.

These objections seem technical and unsubstantial to those who only arrive at conclusions from local views of convenience. As Richardson says, in one of his novels, "the doctrine is nothing without the example." But if the use of this foolish law is persisted in, there will be a great scandal

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some day. Instead of a known crimp, some perfectly innocent person will be arrested, of sufficient importance to render it dangerous to adopt the view about to be sanctioned, and then, I venture to predict, the precedent we are about to create will be swept away without hesitation.

Wise legislators sometimes pass stringent laws to check extraordinary abuses; they never confound innocence and guilt. The wisest pass reasonable laws, and endeavor to have them faithfully executed. In criminal repression, certainty is more effectual than severity.

Tessier, J.—Cette cause est bien importante, parce qu'elle tend à mettre de côté l'effet d'un statut qui a produit un bon résultat, en faisant presque disparaître les racoleurs (crimps), qui infestaient le port de Québec et contribuaient à ruiner le commerce. On peut trouver étrange, à première vue, la sévérité du statut de 1873, qui permet au magistrat de police de faire le procès sommaire de ceux qui montent, sans permission et illégalement, sur les navires dans le port de Québec, pour engager les matelots à déserter; mais pour ceux qui sont familiers avec la législation antérieure sur le sujet, il n'y a pas lieu de s'en étonner. Cette juridiction a été exercée depuis 1874 par les différents magistrats qui ont rempli cette charge. Il y a eu quatre ou cinq condamnations *convictions* chaque année; mais le nombre en a diminué dans les dernières années. On trouve dans le statut de 1847 que cette offense n'était punie que par une amende.

En 1871 (statut du Canada, 34 Vict., ch. 32), les offenses semblables sont punies de l'emprisonnement de 3 à 6 mois au lieu de la pénalité.

En 1873, par le statut 36 Vict., ch. 129, s. 86 et 87, on a conservé le même langage et la même juridiction sommaire, mais en augmentant la peine jusqu'à deux, trois ou cinq ans de pénitencier.

La section 87, en parlant de l'offense de rôder armé autour d'un navire, dit :

" Toute personne qui sera trouvée rôdant près d'un navire,
" étant alors armée, sera passible sur conviction, devant le
" magistrat de police ou juge des sessions de la paix, d'un

" emprisonnement dans le pénitencier, d'au moins deux ans, " mais pas plus que trois ans. " Michael Clarke & L'Hon. Alex. Chauveau et al.

Voilà clairement la juridiction donnée, non pas à *la Cour* des sessions de la paix, mais expressément et spécialement au *magistrat* de police ou *juge* des sessions de la paix, qui n'a pas droit de convoquer un jury.

Mais l'offense actuelle tombe sous la section précédente, No. 86 ; il est question de l'offense de ceux qui montent, étant armés, sans permission et illégalement à bord des navires. Le texte anglais se lit comme suit : No person, &c. (See *ante* p. 227).

Le texte français sert à indiquer le sens de ces mots " *to be dealt with* " en se servant des mots " *pour être jugé* " suivant les dispositions du présent acte.

Or si le magistrat de police est autorisé à *juger* l'accusé, il ne peut le faire que par procédure et *conviction* sommaire suivant l'acte général 31-32 Vict., ch. 31, qui pourvoit à ce genre de procédure. L'accusé doit *être jugé* suivant les dispositions de l'acte, or il n'est indiqué dans cet acte de 1873 aucune autre procédure.

Il est donc évident que le législateur a donné et a eu l'intention de donner juridiction sommaire de sommer ou appréhender les contrevenants et de les juger, condamner ou absoudre.

En référant aux autres sections de ce statut, on ne trouve que le mode de procès sommaire " summary conviction. " La section 114, à la fin, dit : " Le juge de paix condamnera " aussi le délinquant à l'emprisonnement, si le cas y échet..."

La section 116 dit : " Il ne pourra être appelé d'aucune " *conviction prononcée* ou d'aucun *ordre* décerné, sous l'empire " du présent acte par aucun juge de Sessions de la Paix, Ma- " gistrat de Police, etc... nulle conviction prononcée sous " l'empire du présent acte, ne sera annulée pour cause de " manque de formalité, ni évoquée par voie de *certiori* ou " *autrement...* "

Il est bien vrai que le procès par jury est un privilège précieux pour les accusés ; mais le législateur est bien justifié de s'en passer à cause de la nature de l'offense, et de l'inconvénient considérable de retenir les officiers et les matelots des navires pour servir de témoins à l'époque des sessions éloi-

Michael Clarke & L'Hon. Alex. Chauveau et al.

gnées de la Cour. Il ne faut pas le regretter, parce que cette sévérité a presque mis fin à la criminelle industrie des racoleurs, des *voleurs de matelots* (*crimps*). On ne retrouve pas cette sévérité dans les ports en Angleterre, c'est vrai, mais la raison en est qu'il y a là abondance de matelots et rareté ici; de plus le système de police est beaucoup plus effectif là qu'ici, où on compte à peine un homme de police pour chaque mille personnes de la population.

On a dit que l'accusé n'avait pas été appréhendé. S'il ne l'a pas été, il est libre et n'a pas lieu de se plaindre. La procédure sommaire n'exige que la sommation, et l'accusé peut comparaître par procureur *ad litem* suivant les sections 7 et 36 du statut 32-33 Vict., ch. 31.

Paley, *On Convictions*, pages 70 et 80: " Right to proceed " and *adjudicate* after summons without presence of De- " fendant. It is not doubted since determination of *Regina vs.* " *Simpson.* "

Il n'a pas été produit régulièrement de pièces de la procédure pour montrer si l'accusé a comparu ou fait défaut; cependant lors de l'argument de la cause, il a été dit qu'il avait été défendu par son avocat devant le magistrat. Cela semble suffisant pour établir qu'il n'y a pas lieu d'ordonner l'émanation du bref de prohibition.

Il convient maintenant d'examiner la procédure de l'Appelant, à un autre point de vue.

Pour obtenir un bref de prohibition, il faut toujours produire des affidavits de circonstances pour satisfaire le juge. Dans cette cause il n'y a pas d'autre affidavit que celui du procureur *ad litem* du requérant, qui jure en termes généraux que les allégations de la requête sont vraies. N'eût-il pas été nécessaire de constater pourquoi la partie condamnée ne donne pas son affidavit elle-même. Ceci eût montré où elle est détenue, si elle est emprisonnée ou non. Il eût dû dire aussi s'il a fait objection à la juridiction devant le magistrat. Peut-être que le juge de la Cour supérieure qui a refusé d'émaner le bref n'a pas voulu sanctionner une pratique assez dangereuse d'admettre l'affidavit du procureur *ad litem*, s'il ne montre pas qu'il n'a pu s'en procurer de la partie elle-même.

La Cour d'Appel doit-elle sanctionner cette pratique?

" The affidavit should set out the proceedings in the Court " below and detail all the material facts necessary to show " the want of jurisdiction. It should also, in cases where an " objection has been made at the trial, state that or any other " facts tending to negative acquiescence in the authority of " the Inferior Court." (*Mondyke and Stint*, 2 Mod., 272.—7 Law Reports, 1872, p. 416, *Cullen and Timble*).

Notre code de procédure, article 1031, référant à l'article 1023, en assimilant la procédure du bref de prohibition à celle du bref de *mandamus*, exige " requête appuyée de *déposition* sous serment exposant les *circonstances* de l'affaire."

" Being an extraordinary remedy, it issues only in cases of necessity." (High, Extraordinary Remedies, No. 765).

Y a-t-il nécessité extrême, si c'est un fugitif de justice qui a évité l'arrestation?

On retrouve bien peu de cas dans lesquels cette Cour ait révisé l'ordre d'un juge de la Cour Supérieure refusant un bref de prohibition, excepté la cause de *Brassard vs. O'Farrell*, qui se présentait sous des circonstances extraordinaires. Il me semble qu'il faut être strict dans l'exercice du pouvoir de réviser un ordre de cette nature qui a dû être donné après sérieuse considération et, d'après ce qui a été dit à l'audience, avec le concours des autres juges de la Cour Supérieure.

Après un examen attentif donné à tous les points soulevés en cette cause, je n'hésite pas à concourir dans l'opinion de la majorité des juges de cette Cour de rejeter le présent appel.

Appel rejeté.

O'Farrell, pour l'Appelant.

J. E. Larue, *C. R.*, pour les Intimés.

MONTRÉAL, 28 AVRIL 1882.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, Juges.

No. 294.

HENRY HOGAN ET AL,

Défendeurs en Cour inférieure,
APPELANTS;

ET

L. C. W. DORION,

Demandeur en Cour inférieure,
INTIMÉ.

Action en dommages. Queston: Droits d'une personne dans un hôtel où elle ne loge pas. Droits et devoirs de l'hôtelier vis-à-vis de cette personne.

La déclaration du Demandeur relatait les faits suivants :

Que le huit juillet courant (1880), le Demandeur ayant à rencontrer une personne à l'hôtel connu sous le nom de "St. Lawrence Hall" et tenu par le Défendeur Hogan, en la cité de Montréal, dans le district de Montréal, entra paisiblement dans le dit hôtel, sans obstruer en aucune façon les hôtes du dit hôtel, et se tint dans la salle d'entrée où les personnes ayant affaire dans le dit hôtel se tiennent généralement;

Que pendant que le Demandeur était ainsi au dit hôtel et y attendait l'arrivée de la personne qu'il désirait rencontrer, le dit Défendeur Hogan, sans droit ni raison, enjoignit et ordonna d'une manière impérieuse et insolente au Demandeur d'avoir à laisser le dit hôtel;

Que le Demandeur, sentant qu'il se trouvait dans une maison d'entretien public, dans laquelle il avait le droit d'entrer pour rencontrer ceux à qui il pouvait avoir affaire dans le dit hôtel, fit observer au Défendeur Hogan que sa conduite était inconvenante et qu'il n'était pas habitué à être traité de cette manière par une personne bien élevée;

Que le Demandeur, nonobstant le droit qu'il avait de rester dans le dit hôtel pour rencontrer la personne qu'il désirait voir, répondit au dit Défendeur Hogan qu'il allait tout de même se retirer, et que, de fait, le dit Demandeur se dirigea sans plus d'observation vers la porte de sortie du dit hôtel;

Que pendant que le Demandeur se disposait ainsi à laisser le dit hôtel, le Défendeur Hogan, sans laisser au Demandeur le temps de sortir tranquillement et sans bruit, le saisit violemment par le bras, lui enjoignit de nouveau de sortir et, ajoutant une nouvelle insulte à cette violence, il appela l'autre

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défendeur Edward Murphy, domestique au service de l'établissement et lui donna, à haute voix et de manière à être entendu d'un grand nombre de personnes qui circulaient en ce moment dans le vestibule ou salle d'entrée du dit hôtel, l'ordre de chasser et de mettre immédiatement le Demandeur à la porte ;

Que le dit Défendeur Edward Murphy, en exécution du dit ordre, suivit le Demandeur en lui enjoignant, à diverses reprises, de sortir de l'hôtel et même en l'assaillant et le poussant violemment dans la rue, quoique le Demandeur se dirigeât paisiblement vers la porte de sortie ;

Que durant toute cette scène le Demandeur a été traité par les Défendeurs d'une manière brutale, et chassé de l'hôtel comme une personne ayant commis des désordres et n'ayant pas le droit de se tenir en compagnie d'hommes respectables ;

Que par le fait des Défendeurs, le Demandeur a été soumis à l'humiliation déshonorante de se voir aussi indignement traité et éconduit du dit hôtel, en présence d'une nombreuse société, et qu'il a ainsi souffert, par cette conduite des Défendeurs, dans sa sensibilité, son honneur et sa réputation, des dommages pour au moins la somme de cinq cents piastres.

Suivent les conclusions ordinaires.

A cette action, les Appelants plaidèrent que l'Intimé n'était pas dans la salle d'entrée du dit hôtel, mais qu'il était dans la chambre de toilette, sans droit, n'étant pas un hôte de la maison, qu'il répandait du papier par terre, et qu'il n'avait été mis à la porte du dit hôtel que parce qu'il ne voulait pas sortir de lui-même et sans violence inutile.

Après audition à l'enquête et mérite, la Cour supérieure présidée par l'honorable juge Papineau, rendit, le 13 décembre 1880, le jugement suivant :

" La Cour, après avoir entendu les parties par leurs avocats
" sur le mérite de la présente cause, examiné la procédure,
" la preuve faite et délibéré ;

" Considérant que le Demandeur a prouvé les allégations
" fondamentales de sa demande et que les Défendeurs n'ont
" pas justifié leur défense ;

" Considérant que la preuve constate que le Demandeur
" n'a rien fait qui pût justifier les procédés ignominieux em-
" ployés par les Défendeurs pour précipiter sa sortie de l'hôtel

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"occupé par les Défendeurs, et que le Demandeur en a souf-"fert moralement;

"Condamne les dits Défendeurs conjointement et solidaire-"ment à payer comme dommages exemplaires au Demandeur "la somme de quinze piastres, avec frais de première classe "à la Cour de Circuit, y compris les frais d'enquête écrite, "distraction des quels dépens est accordée à Maître C. A. "Geoffrion, avocat du Demandeur."

Ce jugement, porté en appel, a été confirmé par la Cour du Banc de la Reine, sauf quant aux frais d'appel qui furent divisés; l'honorable juge Tessier différa sur la question des frais, étant d'opinion que le jugement de la Cour inférieure devait être confirmé avec dépens.

L'honorable juge Ramsay, qui prononça le jugement de la Cour, fit précéder ce jugement des observations suivantes:

"The Appellant is proprietor of the St. Lawrence Hall, and one evening the Respondent who is a practising advocate, went into the wash-room. Mr. Hogan, through some misunderstanding, imagined that he had upset a basket of paper and spoke angrily to him. Some words passed between them and Mr. Hogan ordered the respondent out. The latter was actually going out when a porter, who was probably rather a muscular person, took him by the collar to hasten his departure. The proper mode of having Mr. Hogan punished would be by a summons for the assault, but instead of this Mr. Dorion brought an action in the Superior Court for a large sum of money, and the Court below allowed him $15 damages and the full costs of the action. The Court here thought the Court below was right. The case being brought before it, it had to deal with the action as a question of law. But the judgment ought not to have gone so far as to give all these costs against the Appellant. The Court would not disturb the judgment of the Court below, but considering that it went too far in the matter of costs, this Court would use its discretion, and dismiss the appeal without costs of this Court.

Jugement confirmé sans frais.

Girouard & Würtele, pour les Appelants.

C. A. Geoffrion, C. R., pour l'Intimé.

QUÉBEC, 7 DÉCEMBRE 1881.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No.

ANTOINE GÉRIN-LAJOIE,

Demandeur en Cour de première instance,

& APPELANT ;

JOSEPH DÉSAULNIERS,

Défendeur en Cour de première instance,

INTIMÉ.

JUGÉ :—Qu'une délégation de paiement, dans un acte de vente, n'ôte pas au vendeur le droit de recevoir le prix de sa propriété et d'en donner quittance à l'acquéreur, tant qu'elle n'est pas acceptée par le tiers en faveur de qui elle est faite ou par une personne dûment autorisée à le faire pour lui.

DORION, J. C.—Le 19 novembre 1874, André Gérin-Lajoie, frère de l'appelant, a vendu à l'Intimé un immeuble moyennant une somme de $1,000. Le vendeur a reconnu avoir reçu en à compte $500, lors de la passation de l'acte, et quant à la balance, l'acquéreur s'est obligé de la payer, à l'acquit du vendeur, à l'appelant, aux termes mentionnés à l'acte. Il est déclaré, dans l'acte de vente, que cette somme de $500 était pour acquitter certaines obligations contractées envers l'appelant par le vendeur, ainsi que celui-ci le reconnaît.

A cet acte est intervenu Joseph Gérin-Lajoie, commerçant, qui a accepté, pour et au nom du dit Antoine Gérin-Lajoie, la délégation qui lui avait été faite par le vendeur.

Plus tard, André Gérin-Lajoie, le vendeur, a donné à l'Intimé une quittance pour le montant des $500 encore dues sur le prix de la terre.

L'appelant poursuit l'acquéreur en vertu de la délégation à lui faite par l'acte du 19 novembre 1874. L'Intimé oppose à cette action la quittance que lui a donnée le vendeur.

A l'enquête, l'appelant n'a pas prouvé que Joseph Gérin-Lajoie eût aucune procuration pour accepter la délégation qui lui avait été faite par l'acte de vente précité, et dans ses réponses il établit, avec beaucoup de franchise, que depuis longtemps avant la vente il assistait son frère André en lui fournissant des sommes de deniers pour l'aider à vivre, sans cependant considérer qu'il eût aucune créance qu'il pût recouvrer de lui. Il paraîtrait, d'après la preuve, que Joseph

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...s le but de protéger son frère André et de ...dissiper le prix de sa propriété, l'aurait avisé ... et aurait fait faire une délégation à l'appelant à ... ce dernier.

... cette preuve, la cour de première instance a maintenu ...ction de l'appelant. Ce jugement a été infirmé en Révision, l'un des juges siégeant ayant différé d'avec la majorité de la Cour.

Nous croyons que la majorité de la Cour de Révision a eu raison d'infirmer ce jugement. En effet, quelqu'équitables que soient les réclamations de l'appelant, il n'a aucune créance légale contre son frère André, et la délégation à lui faite par l'acte de vente du 19 novembre 1874 n'a pas été acceptée par lui, ni par aucune personne dûment autorisée à le faire pour lui. Sous ces circonstance cette délégation ne peut être considérée que comme une indication de paiement, qui n'ôtait pas au vendeur le droit de recevoir la balance du prix de sa propriété et d'en donner une quittance valable à l'Intimé.

Pour ces raisons nous croyons devoir confirmer le jugement de la Cour de Révision et renvoyer l'appel.

Jugement confirmé.

Gervais & Gérin, pour l'Appelant.
Malhiot, pour l'Intimé.

QUÉBEC, 8 MAI 1882.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

McKENZIE,

APPELANT ;

ET

TURGEON,

INTIMÉ.

JUGÉ :—1o. Que les parties peuvent appeler, devant cette Cour, de tout jugement rendu dans une cause appelable, même lorsque l'enquête n'a pas été prise par écrit, mais alors l'appel n'a lieu que sur le droit. (Art. 1142, C. P. C.)

2o. Que cette Cour ne rejetera pas un appel à cause d'une erreur cléricale, surtout lorsque les parties n'en souffrent aucun préjudice.

Ceci est une motion de l'Intimé pour faire rejeter l'appel, 1o. parce que la défense est simplement une défense au fonds en fait et que l'enquête n'ayant pas été prise par écrit, il ne peut y avoir d'appel ; 2o. parce que l'appel est d'un jugement qui paraît avoir été rendu le 18 mars 1882, pendant que le jugement a été rendu le 18 février.

DORION, juge en chef.—Il y a deux réponses à faire à la première objection.

1o. L'enquête a été prise par écrit par le juge et cela, du consentement des parties ; 2o. lors même qu'il n'y aurait pas d'enquête écrite, les parties pourraient encore appeler, parce que sur une défense en fait, ou même sans défense du tout, les parties pourraient toujours, à l'argument, soulever toutes les questions de droit qui ressortent de la cause.

L'art. 1142 du Code de Procédure Civile ne dit pas en effet que lorsque l'enquête n'aura pas été prise par écrit, il n'y aura pas d'appel, mais seulement qu'alors l'appel n'aura lieu que sur le droit. L'appel peut donc toujours avoir lieu, même lorsque l'enquête n'a pas été prise par écrit, mais alors la partie appelante doit être restreinte aux seules questions de droit, que la cause peut offrir.

Quant à la seconde objection, le cautionnement et les conclusions de la requête indiquent correctement la date du jugement, qui est du 18 février, et non pas du 18 mars, 1882. Il est bien vrai que, dans les allégués de la requête, il est fait mention d'un jugement du 18 mars, mais il faut prendre toute

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la requête, et surtout le cautionnement, pour décider si l'Intimé est exposé à souffrir quelque préjudice, par l'irrégularité commise dans la requête. Le cautionnement étant valable, l'Intimé ne souffre aucun préjudice de l'irrégularité commise dans la requête, et la motion pour renvoyer l'appel est rejetée avec dépens.

Motion rejetée.

Blanchet, Amyot et Pelletier, pour l'Appelant.
Larue et Pacaud, pour l'Intimé.

QUEBEC, 4th FEBRUARY 1882.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 47.

ELISABETH RUSSELL,

Intervening Party in the Court below,

APPELLANT.

&

PIERRE LEFRANÇOIS, *ès qualité,*

Plaintiff in the Court below,

RESPONDENT.

&

DAME JULIE MORIN,

Defendant, mise en cause, in the Court below,

RESPONDENT.

The late William Russell made a will by which he bequeathed nearly the whole of his property to his wife, Julie Morin, the Respondent in the present case. The Appellant attacked this will, her pretension being that when it was made, the deceased was of an unsound mind and incapable to dispose of his property in a will.

HELD:—Confirming the judgment of the Court below, the Honorable Chief Justice dissenting, that when Russell made his testament, he had the mental capacity required to do so.

MEREDITH, CHIEF JUSTICE OF THE SUPERIOR COURT. (1).—The main question in the case is as to whether the late William Russell was of sound mind when he made the will sought to be enforced by the present action; and in order to rightly appreciate the contentions of the parties it is necessary to know the leading events of the life of the Testator, connected with the making of that will.

Russell, who was married three times, died childless. His second wife was a Miss Lefrançois, sister of the Plaintiff. Soon after his marriage, and about the year 1853, Russell adopted his niece, Ellen Russell, who lived with him from that time until the year 1877. All the witnesses concur in saying that the conduct of Miss Russell was most exemplary. For many years she had the charge of the Testator's household. Her management probably with a view of pleasing him, was extremely economical, and there can be no doubt that a considerable part of the property which he accumulated was due to her industry, economy and good management.

(1). We do not generally report the notes of the judges of the Superior Court, but taking in consideration the importance of the present case, we thought we should make an exception to this rule.

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After the death of Russell's second wife, née Lefrançois, he, on the 5th April, 1873, made a will before Auger, N. P., by which he left the whole of his property to his niece and adopted child, Helen Russell, and named her the Executrix of that will. It is clearly proved that the will so made was in accordance with the intentions which Russell had long entertained, and frequently expressed, as to the disposal of the property. Russell and his niece continued to live happily together until the autumn of 1877, about that time he lost some money by the insolvency of Mr. Gilchen, who for many years had been on intimate terms with Russell and his family.

The witnesses agree in saying that Russell was at all times very excitable and violent.

He, whether with or without cause, thought himself much aggrieved by the conduct of Mr. Gilchen, and after an altercation with him ordered Miss Russell not to receive Gilchen's visits for the future. Notwithstanding the order so given, Russell on one occasion upon his return from the country, found Gilchen in his house in company with his niece.

Russell lost his temper, was very abusive, and according to the witnesses for the Plaintiff, told Miss Russell to leave his house the following morning, which she did. And very shortly afterwards Mad. Robitaille (who was afterwards married to Russell) entered the establishment as a servant—the contention of the Intervening Party being that Miss Russell was driven out to have the place clear for Mad. Robitaille.

From Miss Russell's evidence it appears that about the year 1867 Russell became acquainted with Mad. Robitaille, she then being ladies' maid on board the steamer "Union," of which Russell was the Master, and that Mad. Robitaille had been in the habit of calling two or three times each year to see Russell.

Miss Russell in her deposition: "For some time before Mrs. Robitaille entered the house my uncle was drinking very hard, and told me Mrs. Robitaille was coming to live in the house. I begged of him not to do so. When he was intoxicated he said he would do so; one evening he came home very much intoxicated. He had been down the river taking down a ship as pilot. He was intoxicated, and very violent. There was a gentleman present who said, 'Mr. Russell what is the matter, you must be going mad.' He went upstairs, put his

pistol in his pocket, and went away. He came home at four o'clock in the morning. He said, 'you must leave the house, I am going to bring Mrs. Robitaille in; I will be my own Master.' Of course I left the house at eight o'clock the same morning. I then went to live with my sister, who is residing in St. John Suburbs. I stayed there a few days."

It is impossible to say by what motives Russell was influenced in taking Mad. Robitaille into his house, but this much at least is certain, that his conduct towards his niece on that occasion was not only ungrateful and unjust but in every respect inexcusable. It seems probable he thought so himself, for two or three weeks afterwards she, at his request, returned to his house where she remained about a month, when she, as she says, was obliged to leave, as she was "scandalized by the conduct of her uncle and Mrs. Robitaille," who she positively swears were living together as man and wife.

About three months afterwards, namely, on the 21st Nov., 1877, Russell was married to Madame Robitaille, and in less than a year, namely, on the 4th Oct., 1878, Russell made a will by which he gave to his beloved wife, Julie Morin (Madame Robitaille), $4000 and his household effects, to Miss Russell $2000, and to the Rev. Mr. Sexton, for the poor, $1000.

The bequests thus made were equal to nearly one half of his estate, the remainder of which he left to certain of his relatives as his residuary legatees, and as the Executor of that will he appointed his brother-in-law, the present Plaintiff. This will, it may be observed, was prepared by Mr. Austin, N. P., who for a great many years had been employed professionally by Mr. Russell, and under it Miss Russell was deprived of more than three-fourths of the estate which she would have received under the will of 1873.

The will of the 4th Oct., 1878, had hardly been made when Russell appears to have regretted what he had done as being unjust towards his niece, and having two days afterwards met James Doyle, a brother-in-law of Miss Russell, with whom she was living, he asked him to bring her to his house. Miss Russell requested the Rev. Mr. Sexton to be present at the interview between her and her uncle, in consequence, as she says, of Mad. Robitaille having shut the door in her face when she went to see her uncle in the previous month of

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August. The interview between Russell and his niece took place at Russell's house, on the 8th of October, in the presence of the Rev. Mr. Sexton, and of James Doyle, Miss Russell's brother-in-law. Miss Russell's description of what took place in the parlor when she met her uncle is as follows: "My uncle said to me, 'Ellen, come and kiss me,' and rose from the sofa. I went and embraced my uncle. He told me to take a seat on the sofa. He then went on his knees before me, and asked me if I would forgive him for the way he had treated me. I said, 'Uncle, I do not think I merited that treatment from you.' He said, 'You have always been a good child.' I said, 'You put me on the street for the sake of a profligate woman.' For this, Sexton said 'Don't speak that way, Miss Russell.'" The Rev. Mr. Sexton recalls that some one knelt on that occasion, but he could not be certain as to whether it was the uncle or the niece. Miss Russell's version of what then occurred is, however, confirmed by the evidence of James Doyle, who deposes: "When he, her uncle, saw her, "he put his arms round her, and went on his knees, and "asked her forgiveness. He said he had done wrong to Miss "Russell, and she said something that was not very nice, "and he said, 'No more of that talk, it is done now, and "cannot be helped.' Russell then took the persons present "up-stairs in order that Mad. Robitaille might not hear them. "After they had gone up-stairs Russell told Miss R. that he "had instructed his Notary to prepare a will; and requested "me to go to Mr. Austin, the Notary, who had been so ins- "tructed."

Mr. Austin's evidence as to what took place on his arrival is as follows:

"As far as I recollect when I went to execute the will with Mr. DeBeaumont, he (Russell) hesitated, to sign, stating that his wife would not let him. His niece (Miss Russell) began to cry, there was a little fuss; he said to me, 'I will sign the will *coûte que coûte*,' and the will was then signed."

Miss Russell's account of what then occurred is as follows: "After the will had been read to Mr. Russell he said, 'I "must ask my wife's permission to sign it.' He went into the "kitchen and spoke to Mrs. Robitaille. He came back and "said, 'She will not permit me to sign that will.' I said "what was the use of bringing Mr. Austin here and giving

" him all that trouble, if you did not intend to sign it. He " went back again and spoke to Mrs. Robitaille. I heard say " to him, 'Je ne veux pas, laissez moi tranquille.' My uncle " returned and said she would not allow him, I said: 'Well, " uncle, will you not do something for me, you know I am " not strong and cannot work;' he then took the pen and " said, 'I do not care, I will sign it.' My uncle took the pen " and signed the will in presence of Mr. Austin and Mr. De " Beaumont."

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Miss Russell on the same occasion received from her uncle $500. She says he was then much affected, and that he asked her what he was going to do. Her deposition then continues as follows:

" I said I thought I would go to the Convent in Levis and " live there. He said, It is better for you to go there, for you " have no one in the world to protect you.' I asked him " then, 'Why did you give your house away to Mr. St. Mi- " chel?' He said, 'I do not know, I must have been mad.' " He told me that Mrs. Robitaille was very unkind to him, " that she was kind in the presence of strangers, but when " he was alone she called him very rude names."

Miss Russell's description of the last scene of that interview is as follows: " My uncle went into the kitchen and " seated himself alongside of Mrs. Robitaille. He asked me " to go into the kitchen and speak to Mrs. Robitaille. I told " him I would not. He said. 'Come and speak to her for my " sake, for she will punish me for what I have done to-day.' " I was all alone with my uncle. I went into the kitchen. I " found Mrs. Robitaille there and her sister Madame Roy, " and also my uncle. He asked me to shake hands with Mrs. " Robitaille; I refused; he insisted upon my doing so. I " said, 'I will do so to please you.' Mrs. Robitaille said, " reaching out her hand, '*On ne refuse pas de donner la main à* " *un chien*,' She gave me her hand and I took it. I kissed my " uncle, and on going away I said 'Will you permit me to " come back and see you as you are ill?' He said, 'I will see.' " That is all that took place in the kitchen."

I have dwelt upon the interview of the 8th of October, not only because it was the last between the uncle and his niece, whilst the former was in the enjoyment of his intellectual

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faculties, but also because, in my opinion, it in some degree tends to explain subsequent events of importance.

The last mentioned will remained in force until the 27th November, 1878, when Russell executed before Messrs. Andrews & Glackmeyer the will impugned, by which, after a legacy of $2000 to the Rev. Mr. Sexton for the poor of the Parish of St. Roch's, Russell left the whole of the remainder of his property to his beloved wife Julie Morin, as her own absolute property, and named as the Executor of his will his brother-in-law, Pierre Lefrançois, the Executor named in the two wills made in the previous month of October. No one conversant with the facts of this case can read the will just referred to without feeling that its provisions are cruelly unjust towards the Testator's niece, Miss Russell.

That lady, for the reasons already explained, had beed led to believe that by her uncle's will she would be treated as if he had been her father, and yet by the will in question she was cast, I may say, penniless upon the world.

If therefore a will could be set aside merely on the ground of its being unreasonable and unjust, there can be no doubt as to what would be the fate of the will before us.

Resuming, however, as I must now do, the narration of the facts to be considered, it remains only for me to observe that whatever may have been Russell's mental condition when he made the will in question, there can be no doubt that a few weeks afterwards he was completely and hopelessly insane, for on the 2nd of January, 1879, Julie Morin presented a petition alleging that at the date of the petition he was a dangerous maniac, that he required to be guarded by two men, and the petition prayed for his interdiction. On the 4th of the same month Russell was interdicted, and Mr. Austin, the Defendant in this cause, appointed his Curator.

Such are the leading facts of the case, and the contentions respecting them on the part of the heirs of Mr. Russell are: 1st. That he was of unsound mind when he made the last mentioned will.

2nd. That Julie Morin (Madame Robitaille) by means of fraudulent practices had obtained a complete mastery over Russell's mind; that at the date of the said will Russell had no other will than that of the said Julie Morin, and that the

said will was the result of the fraudulent practices, sollicitations and suggestions of the said Julie Morin.

3rd. That the said will was null, as being made in favor of a person living with the Testator as a concubine.

4th. Assuming that Russell believed Julie Morin to be his wife, which she well knew she was not, the will is void for error.

A few words will suffice to explain my views as to the last two of the contentions thus advanced.

It is in evidence that shortly after Russell's interdiction Edouard Robitaille, of whom Julie Morin had heen supposed to be the widow, returned or was brought back to Quebec, and that Julie Morin then obtained against him a judgment *en séparation de corps et de biens.*

But it is not the less true that no one seems to have doubted that Robitaille was dead when his wife was married to Russell. As bearing upon this part of the case, it is deserving of remark that Russell asked three of his old friends (brother pilots), who have been examined as witnesses for the Intervening Party, to be present on the occasion of his intended marriage, *de lui servir de père*, and that no one of them suggested a doubt as to Madame Robitaille being a widow, nor does it, I believe, appear that any one else at or about that time suggested any such doubt.

I, therefore, cannot regard Julie Morin as having lived with Russell as a concubine, and I do not think that the fact of Robitaille not being dead, as was supposed, can have the effect of making the will void for error.

This part of the case was much pressed, and I cannot say that I think it presents much difficulty.

I now come to the contention that the will impugned was the result of the fraudulent practices, suggestions and solicitations of the said Julie Morin, and I may at once say that I do not think this contention is borne out by the evidence.

Great stress has been laid upon the declarations made by Russell on the 8th Oct., that his wife would not let him sign the will of that date, and upon the observation of Madame Robitaille (Julie Morin) overheard by Miss Russell.

It will be recollected, however, that by the will of the 8th Oct., Russell left less than one-eighth of his property to Julie Morin, who was regarded by him, and by every one else, as

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his wife, and gave the whole of the remainder of his estate, except some comparatively trifling legacies, to Miss Russell. That, under these circumstances, Russell should have gone twice to speak to Julie Morin, and that she objected, and he hesitated, does not, I think, show that he was under her control, nor that he had, as has been said, no will but hers. And as to her having been heard to say, "Je ne veux pas, laissez moi tranquille," I do not see that, under the circumstances, she could have been expected to say less. Moreover, it is to be recollected that, notwithstanding her objection and his hesitation, he did then and there execute the will, declaring "I don't care, I will sign it," and that it remained unchanged for about fifty days.

It is also deserving of remark, that although Madame Robitaille knew what was then being done, she did not even attempt to go into the room or do anything for the protection, in advancement, of her own interests.

After the making of the will, and after Miss Russell had obtained $500 in money from her uncle, the parties went into the kitchen. Miss Russell there met Madame Robitaille, who Miss Russell mentions had opened the door for her when she entered the house that morning, but to whom she did not then speak.

Russell then, that is, after the making of the will, asked his niece to shake hands with Madame Robitaille. His niece refused. Russell insisted. Miss Russell said, "I will do so to please you," when Madame Robitaille, reaching out her hand, made the observation already mentioned, "On ne refuse pas la main à un chien," and Miss Russell took it. The incidents of the meeting of the 8th Oct., which took place ten months after Russell's marriage, are important, but I cannot see in them, or in any of the facts proved, anything tending to show that Madame Robitaille ever acquired an undue ascendency in Russell's house.

About three weeks after the interview of the 8th Oct., namely, on the 12th Nov., 1878, Russell revoked a general power of attorney, which he had executed on the third of the same month, in favor of his supposed wife, which shows either that she did not wish to exercise control over his affairs, or that, if she did, he would not allow it. And now coming to the will impugned, it was prepared by a professional man, who had

never spoken to Madame Robitaille, who did not know her even by sight, and who received his instructions from the Testator unassisted and alone.

It would be unreasonable to suppose, and I am far from thinking, that Madame Robitaille did not remonstrate with her husband after the making of the will of the 8th Oct., or that she had not considerable influence over him when the will impugned was made; but after carefully weighing the evidences, that influence, so far as I can judge, was attributable not to unkindness of any description on the part of Madame Robitaille, nor to apprehension of ill-treatment or anything of that kind on the part of Russell, but, on the contrary, to the care and devotion with which it is proved she nursed night and day for a period of more than a year a person sick and suffering, whom she regarded as her husband.

It was very strongly contended that Mad. Robitaille ought to have gone into the witness box; but she had had the misfortune to live, as a wife, with Russell whilst her husband Robitaille was still alive, and, such being the case, I think she is, to say the least, excusable in not offering her evidence, and that her not having appeared as a witness is consistent with her conduct, as proved upon other important occasions.

I shall dwell no longer upon this part of the case, as I am clearly of opinion that the contention of the Plaintiff now being considered is not borne out by the evidence.

I now come to the main question in this case, namely, was Russell of sound and disposing mind when he made the will sought to be enforced by the Plaintiff as Executor? The fact which first led some, if not many, persons to believe that Russell was insane seems to have been the passing of a deed, on the 2nd October, 1878, by which he transferred a house he was then building, in Dominick street, to Mr. St. Michel, on conditions which, as stated in the deed, were certainly unreasonable and unfair as regards Russell. It appears that Russell, being the owner of a lot worth about $350 on the street last mentioned, in the month of August, 1878, contracted with Pierre Bélanger for the building of a house upon that lot for $1700. By the end of September Russell had paid $732 on account; on the 2nd October Russell transferred the house to St. Michel without warranty receipt, of his own acts and deeds, on condition that St. Michel should finish the buil-

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ding of the said house at his own costs and charges, fulfil for Russell all the clauses and conditions of the contract between him and Bélanger, and to make all the payments to become due under the said contract. The house was finished in about six weeks, and on the 12th of November a deed was passed before Austin, N. P., in which it is declared that at the time of the passing of the said deed of transfer, Russell was in feeble health and much worried about his temporal affairs; that he, at the time of the passing of the second deed, considered that the said transfer was made without due reflection, and that Russell was desirous that St. Michel would pay him a sum of $400 in compensation, and as an equivalent for the said lot of land, which St. Michel had agreed to do. The deed then contains an acknowledgment of the payment of $400, and a ratification of the just deed. St. Michel swears, in effect, that the transfer of the 2nd October was made in consequence of Russell being prevented by sickness from looking after the work himself, and subject to an agreement that Russell should have a right to get back the house when finished upon paying all St. Michel's disbursements. This statement, however, it must be observed, is at variance not only with the conditions contained in the deed of transfer, but with the Declaration of Russell in the deed of ratification.

It is also to be remarked that a certificate was obtained from Dr. Henry Russell the day before the deed of ratification, to the effect that he had visited Russell and found him "in a "sane state of mind, clear about business affairs, and capable "to arrange and conduct any business of his own." Dr. Henry Russell in his deposition explains the circumstances under which that certificate was granted and his reasons for giving it, and with reference to it he says: "Russell was very an- "xious that I should give the certificate, he seemed very clear "on that point." The doctor adds: "To allow that transaction "to be entered into, I gave the certificate. He seemed clear "enough for that particular business, and for that purpose "I gave the certificate." But in answer to the question, "with "respect to other general business do you think he was then "in a fit state to transact that?" The doctor answered: "He "was not at all sane. He could be easily led in any direc- "tion." There is, therefore, a difference between the Doctor's evidence and the terms of his certificate. But whatever may

have been Dr. Henry Russell's intention in giving that certificate it may be presumed that it would not have been asked for had not grave doubts been entertained in some quarters as to Russell's sanity at that time, and the same remarks apply to the certificate obtained from the Rev. Mr. Sexton, about the 26th November, the day before the making of the will in question.

Returning however, to the transfer to St. Michel, he says that, including some small sums paid by him under his agreement with Russell, and the $400 so paid to Russell, the house cost him very nearly $1500. He sold it some weeks after for $1600, and there is no proof that it then was worth or could have been sold for more.

From the evidence of Dr. Henry Russell we learn that Russell had to be put on the sick list of Pilots in April, and that in July he was suffering great agony from skin disease. Some of the witnesses speak of his sufferings "as intense," and his sores as "horrible to look at." Towards the end of September he was confined to his house, and unable to attend to the putting up of the building for which he had contracted. Indeed there can be no doubt that, owing to disease, pain, confinement and business anxiety, Russell was in a wretched state as to body and mind when the deed with St. Michel was passed on the 2nd October.

Bélanger, the contractor, who went to him for money towards the end of September says: "Cette fois là il avait l'esprit dérangé. Il se promenait dans la maison en caleçons pas habillé. Il me dit en me voyant qu'il était ruiné, qu'il était dans le chemin. En me voyant il me dit: Tu veux de l'argent, et je lui ai dit, Oui. Il dit, Je ne suis pas capable de te payer. Je suis ruiné." And in answer to the question, "Vous a-t-il offert quelque chose," the witness says, "Il a dit qu'il allait me donner la maison en payement, que cette maison là le troublait." And the question being put to him, "Etait-il dans un état d'esprit à pouvoir faire quelque contrat, et de savoir ce qu'il faisait," he answered "pas du tout." Several witnesses, to some of whom Russell offered the same house on equally unreasonnable terms, give evidence to the same effect. Indeed, if the question now was as to whether the transfer of the house could have been set aside, I would say, viewing it by itself, and considering the insufficiency of the

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considerations as set forth in the deed, that it could. But I nevertheless am not prepared to say that Russell even then was out of his mind. My view of the matter is that owing to the truly wretched position in which he found himself his spirits had become so depressed as to render him unable to take a right view of the particular contract in which he was then engaged, and to the execution of which his bodily infirmities prevented him from attending. But the men who can "take fortune's buffets and rewards with equal thanks" are few in number, and it falls to the lot of only too many to know that ill health or anxiety of mind may cause them to view with dread and even dismay enterprises which, under ordinary circumstances, they would undertake and carry through without hesitation or difficulty. The evidence adduced by the Intervening Party to prove that Russell was of unsound mind is by no means confined to the transfer in favor of St. Michel. On the contrary, a great number of witnesses of good standing and intelligence speak of Russell as having been insane from the time of the making of the transfer to St. Michel until he was interdicted early in the following January, but a great number of equally competent witnesses testify that Russell was not insane until a few days before his interdiction.

It is not my intention, owing to causes to be hereafter noticed, to now pass in review the expressions of opinion by the witnesses on the one side or the other as to Russell's mental condition, or to state my views as to the credit that ought to be given, or as to the importance that ought to be attached to those opinions. I cannot, however, avoid expressing my opinion as to the evidence directly relating to the will impugned, and as having an important bearing upon this part of the case. I deem it right to briefly notice the business transaction in which Russell appears to have been engaged between the transfer to St. Michel on the second October and the date of the will now impugned. On the day after that transfer, namely, on the 3rd October, Russell executed in favor of his wife a general power of attorney before DeBeaumont, N. P.

The will of the 4th October, that being only two days after the transfer to St. Michel, was made before Mr. Austin and Mr. DeBeaumont. It is not contended that these gentlemen

are biassed in favor of Madame Robitaille or prejudiced against Miss Russell. Nevertheless neither of them was questioned as to the state of mind in which Russell was on the 4th October, when that will was passed, that being only two days after the transfer to St. Michel. We have the will of the 8th October about which so much has already been said.

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The witnesses who were present at the signing of the will were Miss Russell and the two Notaries, Mr. Andrews and Mr. DeBeaumont. As the Notaries had to be sent for, a considerable time must have elapsed between the time when Miss Russell and the Rev. Mr. Sexton arrived at Russell's and the time when Miss Russell left. That lady has given us the conversation she then had with Russell, and no one of his observations on that occasion has any tendency to show that his mind was then impaired.

That he went on his knees when he begged his niece to pardon him appeared to me when I first heard of it, and still appears to me, very singular. But Russell was at all times impulsive and excitable; his conduct towards his niece had been unreasonable and ungrateful. Mr. Austin attributes the making of the will of the 8th of October to remorse of conscience.

Russell, it is of importance to observe, wished not only to be pardoned by his niece but to cause a reconciliation between her and Julie Morin, and being in the presence of his priest he went upon his knees; the position was certainly a strange one, but it does not appear to have caused those who saw what took place to entertain any doubts as to the soundness of Russell's mind. And if any such doubt had existed the conversations in which he then took part ought to have removed it. Continuing to notice the business transactions in which Russell took part, between the making of the will of the 8th October and that of the 27th November, we find that on the 28th October, by an act before DeBeaumont, Russell cancelled the power of attorney of the same month in favor of his wife.

On the sixth of November, Russell went to the office of the Sheriff, and was there paid (nine hundred and sixty-two) $962.00.

On the 12th November, Russell, by a deed before Austin, N. P., ratified the transfer to St. Michel.

On the same day, Russell, who on the 28th day of October

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revoked the power of attorney in favor of his wife, executed a power of attorney in favor of his brother-in-law the Plaintiff.

There must have been some improvement in Russell's bodily condition before the payment of the $962 at the Sheriff's office, on the 6th November, and the two last mentioned deeds, because in the early part of the autumn Russell could not leave his house, whereas the payment of the $962 was made at the office of the sheriff; and the two deeds of the 12th November were executed at the office of Mr. Austin.

About the 17th November Russell had at least two interviews, of about an hour each, with Messrs. Dusseau, Levasseur, Bouleau and Begin, Syndics for the building of a church in the Parish of St. David, at one of which meetings the Rev. Mr. Sexton was present. The Syndics wished to obtain a loan for the building of their church; but Russell did not accede to their application, deeming the security offered insufficient.

On the 23rd November Russell executed a discharge before Mr. Wincelas Larue, N. P. As observed by the learned Counsel for the Intervening Party, Mr. Russell did on that occasion request the Notary who had offered notes of the National Bank (Banque Nationale) in payment, to ascertain from his legal adviser, Mr. Andrews, Q. C., whether he could receive them with safety. This certainly was a very unnecessary precaution, but the Notary who was subjected to the trouble of making that enquiry swears in a positive manner that he did not suspect that Russell was then incapable of contracting.

We thus see that in the month during which the will impugned was made, Russell met on business nine persons, occupying positions of trust, and that none of them suspected his mind to be unsound, except Mr. Austin, the Notary, who had prepared the will in favor of Miss Russell. Mr. Austin says, he hesitated on the 12th November to make any papers until the Doctor's certificate was produced that Russell was of sound mind. It may be observed, however, that Mr. Austin on the same day executed a power of attorney, under which Russell appointed Lefrançois his Attorney, with very extensive powers.

I now come to the execution of the will disputed, bearing date the 27th November. The Notary employed was Mr. Andrews, whose standing as a professional man has not been questioned, and it is of importance to observe that Mr. An-

drews was not then in any way acquainted with Mad. Robitaille. On the 24th or 25th November, Mr. Andrews, N. P., on his arrival at his office, was informed by his father, Mr. Andrews, Q. C., that Russell had been there the day before to have his will made. Mr. Andrews the Notary went the same morning to Russell's, who instructed him to make a will leaving certain legacies, small amounts $400 or $500, I think, to three of his nephews and one niece, and the remainder of his property to his wife, Russell saying at the same time that he would call at the office of the Notary the following morning. When these instructions were given Russell and the Notary " were alone in the room, and the doors were shut."

The instructions thus given to Mr. Andrews show that the claims of Miss Russell had fallen in the estimation of Russell, not only in comparison with those of his wife, but also in comparison with those of his other collateral relations.

On the following morning Russell went to the office of Mr. Andrews, saying that he had changed his mind, that the parties to whom he had intended to leave the legacies already mentioned had no gratitude to him, and gave instructions according to which the disputed will was passed. Russell went on three occasions to the office of Mr. Andrews in relation to the will, was each time alone, and according to the evidence of the Notary, he, the Notary, was never spoken to as to the provisions of the will before it was executed by any one but the Testator himself. And as to the state of the Testator's mind the Notary says : " I consider that he was in perfect mind, and knew perfectly what he was doing."

Mr. Glackmeyer, the second Notary, did not know Mad. Robitaille before the making of the will.

In consequence of Mr. Andrews being absent from the office when Russell went there to execute the will, Mr. Glackmeyer, the second Notary, had occasion to converse with the Testator about half an hour.

Whilst Russel was waiting Glackmeyer handed to him the draft of the will, which he had, and seemed to be perfectly satisfied with. The will was on the arrival of Mr. Andrews, N. P., executed before the two Notaries in the usual manner, the only persons present being the two Notaries and the Testator.

Being asked, " What was your opinion of his mental con-

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dition on that day?" Mr. Glackmeyer answered, "As good as any body else. The man conversed very freely. I never saw any change in him that day, any more than usual, and I had known him since I was a boy." And the evidence of the two Notaries is not in any way weakened by their cross-examination.

I have already repeatedly said, that I think the provisions of the will so made exceedingly unjust as regards Miss Russell. It is quite certain that they were contrary to the intentions entertained and expressed by Russell during a long series of years. There is also doubtless a striking contrast between the will of the 8th October, which gave the bulk of the estate to Ellen Russell, and the will of the 27th November, in which she is not mentioned.

It seems to me, however, that the difference between those two wills and the change in Russell's intentions regarding his niece are to some extent attributable to the incidents which occurred during the interview of the 8th October.

Russell could not have treated his niece more affectionately than he did when she entered his house that day; but, in answer to his very kind advances, Miss Russell spoke of the person who was living with him as his wife, and who, I believe, he really thought was his wife, as being "a profligate woman." Russell's observation, "no more of that talk," shows that he was then displeased, and the remonstrance of the Rev. Mr. Sexton, and the evidence of Miss Russell's brother-in-law Doyle, show the impression made upon their minds by Miss Russell's answer to her uncle.

Russell, nevertheless, on that occasion gave Miss Russell $500 in money, and made a will in her favor according to her wishes. He then attempted, but without much success, to induce his niece to become reconciled with the person he believed to be his wife, and it will be recollected that when Miss Russell was leaving, in answer to the question, "Will you permit me to come back and see you?" Russell said simply, "We will see."

It does seem to me that Russell's tone at the close of that interview was very different from what it was when he first met his niece that day, and I have alluded to Miss Russell's deportment on that occasion towards Mad. Robitaille not at all for the purpose of blaming the former, but as tending to

explain the change, whether reasonable or unreasonable, in the feelings of her uncle towards her.

It is also proved by three witnesses, Mr. Lefrançois and his two daughters, that after the meeting of the 8th October Russell sent a message to his niece to the effect that he did not wish to see her, and that she need not expect anything further from him.

Moreover, four witnesses, quite disinterested, namely the syndics, Boulleau, Levasseur, Dusseau and Begin, prove that about ten days before the making of the will in question Russell spoke of his money as intended for his wife.

Bearing in mind, then, the conversations and incidents of the 8th October, that being six days after the transfer to St. Michel, of which so much is said, and also the numerous business transactions in which, as already mentioned, Russell was engaged between that day and the 27th November, the date of the will disputed, seeing the positive evidence of the two professional men before whom the will was passed, and that the disposal of the Testator's property by that will is in accordance with the message proved by three witnesses to have been sent to his niece, and with the declarations in favor of Madame Robitaille made in presence of four witnesses, I must say that although the case may not be free from difficulty, so far as I am capable of judging, Russell knew perfectly what he was doing when he made the will in question, and was then, in contemplation of law, of sound and disposing mind.

In coming to this conclusion, although I have only to add that I have carefully considered the depositions of the numerous witnesses as to the state of Russell's mind for some months before he made the will in question. Unfortunately, after all the witnesses for the Intervening Party had been heard before another justice, he was obliged to leave town, and all the witnesses for the Plaintiff were heard before me.

Under these circumstances I feel reluctant to comment upon the impression produced upon my mind by the demeanor of the witnesses for the Plaintiff, as I cannot do the same with respect to the witnesses for the Intervening Party. I have no doubt it will be thought by the parties, and more particularly by the one losing, that there are many points in evidence deserving of comment, which I have left unnoticed; but it is

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to be recollected that the depositions in this cause extend over no less than 948 pages, and were I to attempt a written review of the whole evidence so adduced my task would be endless. This, however, I can say, that I have devoted to this case not only all the attention necessary to enable me to form the best judgment that I can in relation to it, but also all the time at my disposal, consistently with the discharge of my other duties.

Before closing these remarks, I desire to advert to the statement sworn to by the Plaintiff, that he and Madame Robitaille were anxious that Mr. Russell should make some provision for his niece. And now that the charge that Madame Robitaille caused the will to be made by fraudulent practices and suggestions has been declared unfounded, I allow myself to hope that they may, if permitted, give effect to the very reasonable wish so expressed. If not, and if Madame Robitaille should attempt to retain that part of the estate which represents the industry and good management of Miss Russell during the best part of her life, the case will, I presume, be taken before a higher tribunal, and the adversaries of Madame Robitaille will be able to say that they formed a truer estimate of her character than I have done.

It remains only for me to refer to the question of costs.

Believing, as I do, that under all the circumstances of this case it was proper that there should be a thorough judicial enquiry into all the circumstances connected with the making of the will in question, I deem it right to order that all the costs incident to that enquiry, that is, to all the costs in this case, as well on the one side, as on the other, be paid by the Curator out of the funds of the estate. My order is in this respect in accordance with numerous English decisions in like cases. I do not fail to bear in mind that the Intervening Party does not expressly pray for costs against the Curator, but she does pray for costs against Julie Morin; and the estate in the possession of the Curator is by the present judgment declared to belong to Julie Morin, so that the judgment in effect gives to the Intervening Party, as to the costs, not exactly what is asked but less than what is asked.

DORION, C. J.—This is an action by Pierre Lefrançois, one of the Respondents, as Executor to the last will and testament of the late William Russell, of the 27th of November, 1878,

against Henry Charles Austin, to account for his administration as Curator of Russell's property, who, before his death, had been interdicted for insanity.

The Appellant, Elizabeth Russell, a niece of the deceased, has intervened in the cause, and both as one of his heirs at law and as a special legatee by a former will has impugned the validity of the will of the 27th of November, 1878, on the grounds:

1st. That Russell was not of sound mind when he made this will.

2nd. That the will did not express his true intentions, but was the result of undue influences exercised by Julie Morin, one of the Respondents, who, taking advantage of the Testator's mental and physical weakness and incapacity, caused this will to be made in her favor.

3rd. Because the will was made through error to the quality of the universal legatee, Julie Morin, who was not the wife of Russell but a married woman who lived with him in adultery.

4th. That the will was against good morals.

5th. That the formalities required by law had not been observed.

After the petition of the Appellant to be permitted to intervene had been received, Julie Morin, the sole universal legatee named in the will, was made a party to the action, and both she and Lefrançois separately contested the intervention by a general denial of all the allegations of the Appellant's petition.

A great number of witnesses have been examined in the cause as to the condition of the Testator's mind when he made his will, and the Superior Court came to the conclusion that the will was valid, and dismissing the petition of the Appellant, it has ordered the Defendant Austin to render an account of his administration of the Testator's estate and property.

The Honorable Chief Justice of the Superior Court, who rendered the judgment, could not refrain in his careful review of all the circumstances of the case from making the following observations, the appropriateness of which are made painfully manifest to all those who have had to read the evidence.

" No one conversant with the facts of this case (said the " learned Chief Justice) can read the will just referred to " without feeling that its provisions are cruelly unjust towards " the Testator's niece, Miss Russell. That lady for the reasons

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"already mentioned had been led to believe that by her "uncle's will she would be treated as if he had been her "father; and yet, by the will in question, she was cast, I "may say, penniless upon the world."

"If, therefore, a will could be set aside on the ground of "its being *unreasonable* and *unjust*, there can be no doubt "what would be the fate of the will before us."

While admitting that the injustice and even the unreasonableness of a will are not alone sufficient causes for setting it aside, yet it cannot be denied that when a will, characterized in the strong language used by such high authority as the learned Chief Justice, is challenged by the heirs at law, on the grounds of insanity of the Testator, of error and of undue influence, a duty is imposed upon us to inquire into every circumstance calculated to throw light upon the causes which may have lead the Testator to deviate so widely from the usual course as to subject the last disposition which he has made of his property to the charge of being cruelly unjust and unreasonable.

We may at once dispose of the objections taken by the Appellant to the form of the will by saying that, supposing that all the formalities required by Articles 843 and 844 of the Civil Code for a notarial or authentic will had not been observed, the present will would still be a valid will under Articles 854 and 855 of the Civil Code, so that the Appellant has no interest in urging those objections.

As to the immorality of a will or disposition made in favor of a person living in adultery with the donor or testator, although this would be a good objection to a donation *inter vivos*, it is no objection to a bequest or legacy. This question has been finally settled by the judgment rendered by the Judicial Committee of the Privy Council in the four cases of *King* vs. *Tunstall and others* (20 L. C. J. 49). It has there been decided that the disabilities which formerly existed with regard to legacies made to persons living in adultery with the testator and to their offsprings had been removed by the Imperial Act 14 Geo. III, Ch. 4, and by the Canadian Act 41 Geo. III, ch. 4. The pretended illicit connection between the Testator and his legatee, Julie Morin, cannot therefore be made a ground for annulling the bequest made to the latter.

There remain the three objections, of the insanity of the

Testator, of undue influence, and of error as to the quality of the legatee.

The qualifications required to make a will are expressed by these few words in Article 831 of the Civil Code: "Every "person of full age, of sound *intellect* (*sain d'esprit*, in the "French version), and capable of alienating his property may "dispose of it freely by will."

"Pour faire une donation entrevifs, ou un testament il faut être sain d'esprit." (Art. 90 of the Code Napoléon).

The rule is no doubt the same every where, and the only difficulty lies in determining in each particular case if the testator had the precise degree of intellect required to make a valid will.

Demolombe, vol. 18, No. 333, says:—

"Deux conditions nous paraissent nécessaires pour cons-"tituer cette sanité d'esprit, que le législateur exige; à savoir:

"L'intelligence et la volonté.

"Comprendre et vouloir.

"Comprendre le caractère et les effets de l'acte, dont il "s'agit, donation entrevifs ou testament:

"Vouloir faire cet acte et pouvoir aussi bien entendre, ma-"nifester cette volonté."

In the case of *Banks & Goodfellow* (L. R. 5, Q. B. 549) the late Chief Justice of England, Sir Alexander Cockburn, stated with remarkable clearness the degree of intellect required in a person disposing of his property by will. "It is essential," said the learned Chief Justice, "in the exercise of such a "power, that a testator shall understand the nature of the "act and its effects: *shall understand the extent of the property* "*of which he is disposing; shall be able to comprehend and ap-* "*preciate the claims to which he ought to give effect, and with a* "*view to the latter object, that no disorder of the mind shall* "*poison the affections, pervert his sense of right, or prevent the* "*exercise of his natural faculties, that no insane delusion shall* "*influence his will in disposing of his property, and bring about* "*a disposal of it which, if the mind had been sound, would not* "*have been made.*"

It will be noticed how much this passage agrees with the terse description given by Demolombe of what constitutes a sound mind: "L'Intelligence et la volonté." Comprendre et vouloir.

But who is to prove the sanity of the testator?

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The rule in France is that it is the party who challenges the validity of the will who must prove that the testator was insane when he made it, although Demolombe, vol. 18, No. 361, admits that the question is a delicate one, and not so easy to be solved as it would at first sight appear.

In England the rule seems different, and the party claiming the probate has to establish that the testator was of sound mind when he made his will. The burthen of proof, is, however often shifted from one party to the other, according to the presumptions created by the circumstances, and it is admitted as well in France as in England, that if insanity is proved to have existed within a short time either before or after the date of the will, it is incumbent on the party sustaining the will to show that it was made in a lucid interval.

" Toutefois (says Demolombe *loc cit.* No. 361, p. 372) si le " Demandeur prouvait que soit avant, et surtout peu de temps " avant la disposition, soit après, et surtout peu de temps " après, le disposant n'était pas sain d'esprit, notre avis est " que l'espace intermédiaire s'y trouverait compris ; car, enfin, " on ne doit pas non plus exiger l'impossible ! et la vérité est " qu'il serait souvent impossible au Demandeur de prouver " l'insanité d'esprit du disposant, au moment même, au mo- " ment précis et rigoureux où il fait la disposition." A number of cases are cited in support of this proposition.

At No. 356, p. 368, of the same vol. the author says: " Il " faut en conclure que la donation entrevifs ou le testament " fait par une personne qui a été ensuite interdite, peuvent " être déclarés nuls, en vertu de l'article 901, pour cause de " démence, *quoique la démence n'existât point notoirement à* " *l'époque où ces actes ont été faits.* (Comp. Grenier t. I., No. " 166 ; Duranton, t. VIII., No. 155 ; Demante, t. 4, No. 17 bis " IV.)."

Lord Brougham, in rendering the judgment in *Waring* vs. *Waring* (6 Moore P. C. C., p. 356), said : " It is not denied that " some years after the factum, that is in 1841, the testatrix " was found a lunatic by inquisition, that she died undoubt- " edly insane, and that the madness was found by the jury " to go back to within four years of the date of the will.

" This clearly made it incumbent on the party propounding, " to show the sanity by much clearer proof than would have " been required had no such disease been admitted, on all

" hands, to have clouded her understanding towards the close " of her life." Elisabeth Russell et al. & Dame Julie Morin

Le Grand Du Saulle, de la Médecine-légale, p. 625, says: " Deux cas du reste peuvent se présenter, où le testament ren-" ferme des clauses raisonnables et celui qui l'attaque doit " prouver la folie, ou l'acte contient des bizarreries et celui " qui le défend doit prouver la sagesse."

We shall see when we come to consider the circumstances of this case that it was incumbent on the Respondents to prove by the clearest evidence, as it was decided in the case of *Close* & *Dixon et al.* (17 L. C. J., 59), confirmed in appeal in December, 1876, that the Testator was of sound mind when he made his will.

A consideration of great importance in determining the question of sanity or insanity of the testator is the character of the disposition itself.

" Est-elle raisonnable? (asks Demolombe, *loc. cit.* No. 362). " Il sera naturel de supposer qu'elle a été faite dans un in-" tervalle lucide."

" La disposition est-elle déraisonnable?

" Il sera, en sens inverse, naturel de penser qu'elle n'a pas " été faite dans un intervalle lucide."

This circumstance is so important that it is almost impossible to find a case, either in France or in England, in which it has not been considered by the Court, or mentioned to the jury, as a strong presumption in favor or against the disposition, according to its being reasonable or unreasonable.

In the case of *Cartwright vs. Cartwright* (1 Phillemore 47) Sir William Wynne, Judge of the Prerogative Court, used these expressions:

" The will is as proper and natural as she (the testatrix) " could have made."

" Now I think the strongest and best proof that can arise " of a lucid interval is that which arises out of the act itself," and the will which was made while the testatrix was in a lunatic asylum was held to be valid.

If the proposition laid down in that case is true, the converse must also be true;—and accordingly we find that, in *Waring vs. Waring*, 6 Moore P. C. C. 341; *Dew vs. Clarke*, 3 Add 75, 5 Russ, 163; *Smith and Tibbetts*, L. R. 1 P. and D. 398; *Broughton vs. Knight*, L. R. 3 P. and D. 64; *Harwood vs. Baker*,

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3 Moore P. C. C. 291; *Smee vs. Smee*, 5 P. D. 84, wills made by parties having the full control of their property, but most of whom, from time to time, had been subject to insane delusions, were rejected upon much weaker evidence of the insanity of the testators than in the case of *Cartwright* & *Cartwright*, because the dispositions were not considered such as persons in the same positions and in the full enjoyment of their faculties would have made.

In *Banks vs. Goodfellow*, L. R. 5, Q. B., at p. 570, Chief Justice Cockburn in his most exhaustive review of the question of insanity, as affecting the power of disposing by will, said:

" No doubt when the fact that the testator has been subject " to any insane delusion is established a will should be re- " garded with the greatest distrust, and every presumption " should in the first instance be made against it................. " and the presumption against a will made under such cir- " cumstances becomes additionally strong when the will is, " to use the term of civilians, *an inofficious one, that is to say,* " *one in which the natural affections and the claims of near re-* " *lationship have been disregarded.*"

Le Grand Du Saulle, Traité de la Médecine Légale, pp. 425 and 426, says:

" Les hallucinations ne sont point un obstacle absolu à la " faculté de tester, quand elles existent depuis longtemps, " qu'elles n'ont pas dénaturé les sentiments affectueux et que " l'individu a toujours rempli ses devoirs sociaux. *Mais il est* " *évident que l'on ne pourrait accepter comme valide le testament* " *d'un halluciné qui deshérite sa famille sans motifs.*"

Troplong, des Donations et Testaments No. 463, says: " Voici " qu'elle est la vraie: (opinion) Si le malade a eu des inter- " valles lucides et *que le testament porte le caractère de la sa-* " *gesse*, on peut le présumer fait dans le temps de la rémission " du mal. Il y a là deux éléments essentiels dont l'accord a " une haute gravité: *l'existence prouvée d'un retour de lucidité* " *d'esprit, la sagesse de l'acte.*"

Demolombe, vol. 18, No. 336, also says; " Ce qu'il faut " ajouter, pourtant, c'est que, lorsqu'il y a doute sur le point " de savoir si le disposant était sain d'esprit, le caractère de la " disposition est à prendre en sérieuse considération"......... and again at No. 339:

" La sagesse plus ou moins grande de la disposition serait

"aussi un élément de décision dans le cas ou il s'agirait d'un "individu atteint d'une folie partielle seulement et circons- "crite, si l'on admettait qu'un tel individu n'est pas incapable "de disposer."

In *Harwood vs. Baker*, already cited, Erskine, J., said, p. 291: "If he had it (the capacity) the injustice of the exclusion "would not affect the validity of the disposition, *though the "justice or injustice of the disposition might cast down some light "upon the question as to his capacity.*"

Also in *Broughton and Knight*, L. R. 3 P. and D. 64, Sir J. Hannen, addressing the jury, said: "You must not disregard "the fact that he (the testator) selected in their place (the "place of his relatives) one who had no natural claims upon "him, of whom he knew little, and to whom he was under "no such obligations as are usually recognised as the foun- "dation of such gifts."

From this it will be seen that all the authorities, both French and English, are agreed as to the intellectual capacity required to make a valid will, and also that in determining whether the testator had such capacity or not the utmost importance is to be given in each case to the justice or injustice, reasonableness or unreasonableness, of the dispositions themselves.

Another point upon which great stress is laid in the English decisions is whether the will is conformable or contrary to previous declarations made by the testator of his intentions. *Harwood vs. Baker*, 3 Moore P. C. C. 317; *Banks vs. Goodfellow*, L. R. 5 Q. B., p. 549; *Prinsep and The East India Company vs. Dyce, Sambo and others*, 10 Moore P. C. C., at p. 285.

Having thus stated some of the rules which, being based on reason and justice, are accepted everywhere without a dissentient voice, I will now proceed to consider the special circumstances disclosed by the evidence affecting the will under consideration.

William Russell was a pilot residing in the City of Quebec. He was married first to a person whose name does not appear, a second time to Hélène Lefrançois, a sister of Pierre Lefrançois, one of the Respondents. He had no issue by either marriage. Hélène Lefrançois died in 1873.

About the year 1850 James Russell, a brother of William Russell, died leaving several children, among whom were

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two daughters, Elizabeth, the present Appellant, and her sister, Ellen Russell; both were quite young and in destitute circumstances. William Russell and his wife Hélène Lefrançois, having no children, took with them Ellen, the eldest of their two nieces. They brought her up as their own child, and she lived with her uncle until some time in the year 1877, four years after the death of Mrs. Russell. For a considerable period of time the duties of attending to the household devolved upon Ellen Russell who, by her kind attention and good management, won the affections of both Russell and his wife.

On the 5th of April, 1873, shortly after the death of his wife, Russell made a will, by which according to the intention he had repeatedly expressed, he left all he possessed to his niece, and constituted her sole executrix of his last dispositions.

Nothing occurred to disturb the kindly feeling which Russell bore to his niece until the summer of 1877, when Russell, who for some time previous had been drinking to excess, mentioned to his niece his intention of taking one Julie Morin, one of the Respondents, in the house as a servant, against which Ellen Russell strongly remonstrated. On one evening Russell returned home in a state of intoxication, and being greatly excited he ordered his niece to leave the house the next morning, which she did, and went to reside with her sister, and subsequently with her uncle Lefrançois. The cause for thus suddenly ordering his niece away was, it would appear, because he had found at his house one Thomas Gilchen, an old friend of the family, to whom he had taken a dislike on account of some money transaction they had together, and in which, according to Austin, he lost $200. About a month after Ellen Russell had left her uncle, he sent for her and asked her to come back to live with him. Julie Morin had in the meantime been introduced in the house as a servant, although Russell never had a servant before. Miss Russell remained in the house for about a month, after which she left a second time under the direction of her spiritual adviser, on account, as she states in her testimony, of the immoral relations existing between her uncle and Julie Morin.

After Ellen Russell had left the house of her uncle for the second time, Russell and Julie Morin continued to live alone

together in the same house, until the 26th of November, 1877, when they were married. By their contract of marriage separation as to property was stipulated, and he agreed to give her, and she to receive, at his death a sum of $400 in full for all matrimonial claims whatsoever.

In the spring of 1878, Russell, owingto declining health, retired from the active exercises of his occupation, and was placed on the sick list of the pilots, on the certificate of Dr. Henry Russell, his medical attendant. From July following the attendance of Dr. Russell became constant, and Russell suffered greatly from a cutaneous disease.

On the 4th of October, 1878, Russell made a will before Austin, Notary, by which he revoked his former will, and bequeathed $4,000 and all his household furniture and effects to his beloved wife, Julie Morin, $2,000 to his niece, Ellen Russell, $1,000 to the Reverend Father Sexton for charitable purposes, and the residue of his estate to his brothers, nephews and nieces in equal shares. On the 8th of the same month he made another will before the same Notary, leaving $800 to his wife, Julie Morin, $400 to each of his nieces, Mary and Elizabeth Russell, and $400 to his brother Patrick, with reversion to his nieces if not claimed within a year, and the remainder to Ellen Russell.

On the 27th of November, 1878, Russell made before Andrews, Notary, the will which is the subject of the present litigation, and by which he revoked his former wills, and gave $2,000 to Father Sexton for the poor of the Parish of St. Roch's and the remainder of his property to his wife, Julie Morin.

On the 2nd of January, 1879, Julie Morin petitioned to have her husband interdicted and a Curator appointed to his person and property. In her petition, she alleged that, for the past five or six days, Russell had shown maniacal tendencies which necessitated his being placed in a lunatic asylum. Among the acts disclosed in her petition were the following: "Walking in the street half dressed, desiring to be sent to "jail, constant allusion to money losses, fear of poverty and "starvation, fear of eternal damnation, threatening to destroy "everything in the house, giving away his wearing apparel "and other effects, attempting to commit suicide," etc. She in fact represented that he was a dangerous maniac and

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required to be guarded day and night. Upon this petition, which was supported by the affidavit of the Petitioner, Julie Morin, Russell was interdicted, and on the 10th of January he was sent to the Beauport Lunatic Asylum, where he remained until December of the same year (1879), when his health having somewhat improved he came out of the asylum and lived with his niece, Ellen Russell, until the month of August, 1880, when he died, being still interdicted.

While Russell was in the asylum, Edouard Robitaille, the husband of Julie Morin, returned from the United States, and requested her to accompany him to his new domicile; instead of complying with his request, she instituted an action against him to obtain a separation from bed and board, in which judgment was rendered on the 9th of January, 1880. These facts are either admitted by the parties or established by undisputed evidence.

I will now consider with these main facts the other circumstances bearing upon the condition of Russell when he made the will of the 27th of November, 1878.

As already stated, William Russell brought up his niece, Ellen Russell, as his own child. She lived with him nearly twenty-seven years; both he and his wife, Hélène Lefrançois, appear to have been very much attached to her, and she undoubtedly deserved their affection.

The learned Chief Justice in analyzing the evidence speaks of her as follows: "All the witnesses concur in saying that "the conduct of Miss Russell was most exemplary. For many "years she had charge of the Testator's household. Her "management, probably with a view of pleasing him, was "extremely economical, and there can be no doubt that a "considerable part of the property wich he accumulated was "due to her industry, economy and good management........ "A good part of the estate represents the industry and good "management of Miss Russell during the best years of her "life............"

It was according to his repeated declarations to that effect, that Russell made the will of the 5th of April, 1873, by which he left to his niece all he possessed. It cannot be said that at that time there was the slightest suspicion that his intellect had been impaired by infirmities, or even dimmed by the unfortunate habit he too frequently indulged in, of

using strong drinks and stimulants. It was not till 1877, four years after he had made this will, that, his habits having grown much worse, he gave the first indications of a weakened intellect. It was then that in order to introduce a servant in his house, he who never had a servant before, unceremoniously turned out of his house his adopted child, and threw her penniless on the charity of poor relatives. A couple of months after this occurrence, he a man nearer seventy than sixty years of age, according to the testimony of his nephew, James Doyle, marries this servant, apparently without making the slightest inquiry about her *status*, not even to the extent of ascertaining whether she was a married woman or not, or whether her husband was dead, and he is satisfied with the declaration she makes in their contract of marriage of her maiden name, Julie Morin, without describing herself as the widow of her late husband, Edouard Robitaille, as it is customary to do, if really she believed he was dead. Russell presented her as Miss Morin to Rousseau, whom he asked to be a witness at their marriage.

Great stress has been laid upon the fact that every body believed that Julie Morin was a widow, and that therefore Russell was in perfect good faith when he married her. I do not question his good faith, but this good faith was owing to deception practiced upon him. Nobody seems to have known this Julie Morin, Ellen Russell alone speaks of her, and not very favorably. None of those who visited Russell were acquainted with her; he had not yet given any sign of insanity, and they naturally supposed that he could not have married a woman whose husband was still living. They had no interest in inquiring into her antecedents, although it was not a difficult task to find out that her husband was living, since it appears that he was discovered through the inquiries of Miss Russell, who was a perfect stranger to both him and his wife. It may well be asked, when a man of religious feelings, of strong will and judgment, such as Russell undoubtedly was in his best days, remarries for the third time under the circumstances just described, if this cannot be considered as a first outward manifestation of a decaying mind.

I do not pretend that Russell became from that moment unable to transact any business, or unfit to make a will. Some men are a long time giving occasional signs of an

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impaired intellect before they can either be interdicted or declared incapable of attending to their ordinary affairs; and when, as in Russell's case, insanity is the outgrowth of intemperate habits, its intensity is gradually developed from the imperceptible starting point, till it has destroyed every vestige of intellectual life, and leaves its victim a complete wreck in body and mind, as Russell is described by Dr. Russell, sen., to have been when he came out of the Lunatic Asylum.

Le Grand Du Sau lle, in his Traité de la Médecine Légale, p. 828, thus vividly describes the symptoms and effects of what he calls L'ALCOOLISME OU FOLIE ALCOOLIQUE.

"Sous le nom d'alcoolisme ou de folie alcoolique on décrit "les différentes formes d'aliénation mentale qui sont la consé- "quence de l'usage habituel et immodéré des boissons fer- "mentées."

At. p. 834, the author says:—

"L'alcoolisé commence par *s'abrutir*, il n'est pas encore "aliéné, mais il est sur le chemin qui conduit fatalement à la "folie. Au bout d'un certain temps variable selon la nature et "la quantité des liquides ingérés, variable aussi selon la force "de résistance des sujets, les désordres s'accentuent tous les "jours d'avantage et l'alcoolisme revêt tous les caractères de "la démence ou de la paralysie générale."

"A partir de ce moment au point de vue medico-légal, "aussi bien qu'au point de vue clinique, le malade est un alié- "né véritable auquel s'appliquent toutes les considérations "que nous avons précédemment exposées."

When Russell turned Ellen Russell out of his house to take Julie Morin as his servant, and when he subsequently married the latter, to use the expressions of Le Grand Du Saulle, "*il n'était pas encore aliéné, il commençait à s'abrutir.*" Brutal passions were taking the place of those kindly sentiments and affections which he formerly had for his own kin, and more particularly for his niece Ellen, whom he had brought up as his own child. This was the first step in that downward course which was soon to lead him into a lunatic asylum, and we shall presently see with what rapidity he moved in that direction. It was in August, 1877, that Russell turned his niece away. In September he takes Julie Morin into his house as a servant; on the 26th of November he marries her; in April, 1878, he is put on the sick list of pilots;

in July he requires the daily attendance of his physician, Doctor Henry Russell; in September following he gives unmistakable signs of a completely deranged mind, and on the 11th of January, 1879, he was sent to a lunatic asylum, after being interdicted on a petition dated the 2nd of January, wherein it was alleged by the petitioner, Julie Morin, that for five or six days past Russell had shewn maniacal tendencies which required his interdiction, and that he should be placed in a lunatic asylum.

This statement of Julie Morin was made under oath, and is a distinct admission that from about the 27th of December, 1878, just one month after the making of his will, Russell had proved himself to be so deranged as to require his interdiction. Attached to the petition for interdiction are certain questions which were submitted to Dr. Russell, who had attended him since April, 1878, and seen him almost daily since the month of July, with his answer given on the 30th of December, and concurred in by the Reverend Father Sexton, Russell's spiritual adviser. Among those questions are the following, with the answers thereto:

Q. 11th. When were the first symptoms of disease manifested, and in what way?

A. Nearly three months, about loss of money.

Q. 25th. What is supposed to be the cause of the disease?

A. Breaking down of an exposed life.

Q. 26th. What treatment has been pursued for the relief of the patient? Mention particulars and effects.

A. Sedative medicines to produce sleep, but no improvement from them.

This professional declaration of the medical and of the spiritual attendants of Russell carries the commencement of his insanity back to the latter part of September, 1878, nearly two months before he made his last will, and the last answer shows that the treatment applied produced no improvement.

St Michel, in answer to the cross-questions put to him by the Respondent, says:

"Le 30 septembre 1878, au matin, le défunt M. Russell "m'envoya chercher chez moi. Je me suis rendu chez lui, "et il m'a demandé là, si je voulais le prendre lui et sa femme, "qu'il voulait *se donner à moi.* J'ai dit, M. Russell, je ne puis "faire cela, vous êtes bien ici, et chez moi, vous ne serez pas

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" logé aussi bien qu'ici, vous avez votre femme..................
" Après bien des instances, je lui dis j'en parlerai à ma femme.
" Après lui avoir donné la description de la maison, qu'il n'y
" avait qu'une chambre dont je pouvais disposer, elle était con-
" tigue à la mienne ; il fallait passer dans ma chambre à cou-
" cher pour aller dans la sienne ; j'avais expliqué tout cela à
" M. Russell ; je lui dis ensuite que j'en parlerais à ma femme
" et que ce qu'elle dirait j'y consentirais, je savais bien qu'elle
" n'accepterait pas."

This is the pressing application of a man worth from $15,000 to $16,000, and living comfortably, who was willing to give the whole of his property to a stranger, (for St. Michel says in another deposition that for thirty years he only visited Russell twice or three times a year, and only began to visit him frequently when he became sick, and more particularly from October to December, 1878,), to go with his wife and live in a single room, the access to which was through the sleeping room of St Michel and his wife. Evidently St. Michel must have thought there was something wrong with Russell, or he would not have given him the evasive answer which he did.

Three days after this extraordinary request, that is, on the 2nd of October, Russell transferred to this same St. Michel a house and lot, on condition that he, St. Michel, should pay to Bélanger, a builder, the sum of $868, balance due on the contract price of $1700 for building the house. The lot was valued at $350. Russell had already paid $832 to Bélanger for building the house, so that Russell really gave to St. Mi chel $1182 for nothing. The deed was prepared under the instructions given by St. Michel to his own Notary, and signed on the same day by Russell, at his own house, without apparently any explanations from the Notary of what it was all about.

The rumor soon spread that Russell was insane, and that he had given his house for nothing. St. Michel heard of this, and on the representations of Dr. Russell that Russell was not in a fit state of mind when he made the transaction, and that he, St. Michel, had taken advantage of him to get the house for nothing, consented to give $400 to Russell if he, Dr. Russell, would give a certificate that Russell was then, on the 11th of November, in a fit state to transact business. The certificate was given, the $400 were paid Russell, and a ratifi-

cation of the conveyance of the 2nd of October was passed before Austin, the Notary, usually employed by Russell. On the same day, and before the same Notary, Russell gave a power of attorney to his brother-in-law, Lefrançois, to transact his business. The deed of ratification contains the following passage:

" And whereas at the time of the execution of the said transfer, the said William Russell was in feeble state of health " and much worried about his temporal affairs, and now con- " siders that suchtransfer was so made by him without due " reflection."

This delicate way of saying in a deed to which St. Michel was a party that the transaction was an unjustifiable one is a confession that Russell was not fit on the second of October to mind his own affairs. This is also shown by the precaution taken by St. Michel to take a certificate of Russell's ability to do business on the 11th of November, and by the additional fact that at the end of November St. Michel sold the house for $1600, after paying Bélanger $925 to finish it, thus making $675 of profit on the original transaction of the 2nd of October, and $275 after he had paid the additional $400 on the 12th or 13th of November. What adds point to the whole transaction is that Russell who had purchased this lot of land in the preceding month of July and had immediately given a contract to build a house upon it, for the purpose of going to live and die there quietly in his own house, gave it away because he was so poor and ruined that he could not pay $200 to Bélanger the builder, and yet six days after the date of the deed to St. Michel, he had $2000 of cash in his own house,out of which he gave $500 or $600 to Ellen Russell,and the balance was deposited in the bank by Lefrançois. (See depositions of Ellen Russell, of Father Sexton, of St. Michel and of Lefrançois.)

It is no wonder that this transaction has been considered indefensible, especially having been made by one whom St.-Michel describes as, " un homme capable dans les affaires," and whose parsimonious habits would remove any suspicion of his having been impelled on this occasion by motives of generosity towards St. Michel.

If we turn to Dr. Russell's evidence it will be seen that, in September, 1878, he found that Russell's " *mind was quite*

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"*altered, that he was not himself, and that he then began to* "*treat him for his mental state.*" Russell began to think he was "a pauper, that he had lost all his money, and was ruined. "He took a religious mania as well, and thought his soul was "lost. Previous to the 11th of November, 1878, Russell had "been complaining to him that he was afraid of starving. He "was not at all sane, and *could be led in any direction.* In "October, 1878, he begged of the witness to take a valuable "clock and other furniture to induce him to give him a "corner in his garret. He grew worse every day, and the "witness is positive that Russell was not, on the 27th of "November, 1878, in a sufficiently sane state to will his property." This witness further states that from the 29th of November he had to change the treatment and substituted chloral for bromide of potash, which he had used before.

He would certainly not have authorized Russell to go out on the 27th of November, and if he had gone out he would have gone without clothes.

It has been contended that Dr. Russell's testimony was entirely destroyed by the certificate which he gave to St. Michel on the 11th of November, that Russell was in a fit state to transact business. It is clear, from the circumstances, that the certificate was given for the sole purpose of righting a transaction by which Russell had been imposed upon, and to secure to him some indemnity for the improvident and ruinous contract he had made with St. Michel. It would have been better for Dr. Russell not to have given this certificate, but he found Russell fretting under the idea that he had been ruined by this and other losses, it is not at all surprising that, animated by a desire to allay the excitement and quiet the nervous system of his patient, and perhaps in the expectation of securing his ultimate recovery, he should have given a certificate going somewhat further than the state of health of Russell did justify. The sole object of the certificate was to enable Russell to receive a sum of money which he could not have recovered except by a law-suit, which would have increased his excitement and destroyed the slight chance still left of his recovery.

Is this certificate, given under these circumstances, which are explained by Doctor Russell himself, to destroy his sworn testimony, corroborated as it is by the other certificate which

he gave on the 30th of December, and which last certificate was accepted and used by Julie Morin, in support of her petition for the interdiction of Russell, as a correct statement of the condition of the latter ?

This last certificate is concurred in by the Reverend Father Sexton, and supported by other evidence to which we are about to refer. Dr. Russell, although of the same name as Russell, was no relative of his ; he has not the slightest interest in the case, and his standing in his profession and in the community where he lives have placed him above the suspicion of being able to give a false testimony to favor the Appellant to the prejudice of the Respondents. No attempt has been made to attack his character, and we must take it for granted that it is because none could be made effectually.

Bélanger, who in August, 1878, undertook to build for Russell the house subsequently transferred to St. Michel, went at Russell's house, at the end of September, to get $200 on account of his contract, when Russell told him he was a ruined man, *qu'il était ruiné*, and he offered to give him (Bélanjer) the house in payment. Russell had then already paid the lot and $832 on account of the $1700 which was the price of the building, and he wanted to give him the lot and house for the balance. Bélanger says positively that Russell was then deranged, "*il était dérangé*" and that from that time to the end of the year he saw him every day or every other day, and that he was not in a fit state of mind to make any contract or to know the purport ("*la portée*") of what he was doing.

Wallace says that in October, 1878, Russell offered to him for $700 the house he transferred to St. Michael, and which he said cost him then $1100. He also asked him if he knew of any respectable family where he could live the remainder of his life, and that he would give them all he had. He thought Russell was not what he used to be, that he had something wrong, and did not seem to be in his usual state of mind. He mentioned the offer of Russell about the house to his late partner, who wanted a house for himself, by saying to him that Russell had offered to him a house very cheap. However they came to the conclusion to have nothing to do with it *from the fact that Russell seemed to be in a very excited state, and the matter was dropped.*

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Gilchen says Russell offered to give him the same house as a pure gift, and he thought the man was insane. Russell said to him that he had offered the house to Prudent Vallée and to Belanger, and that "*he had to give it to somebody, so that he* "*might as well take it himself.*"

Plante, a neighbor, says : dans l'automne, dans les mois de septembre, d'octobre et de novembre, il (Russell) commençait à *craquer*..... Il nous a dit qu'il avait donné sa maison, qu'il avait jeté ses nièces dehors...... "*je ne pense pas qu'il pût être craqué davantage.*"

In Octobor or November he asked this witness to take him with him, that he was not at home where he was and wanted to go away. He sat fully an hour at his gate on a cold day, having only his shirt and drawers on. The witness took his razors from him for fear that he would hurt himself or cut his throat, and he kept them for two or three weeks at his own house : they were given to him by Mrs. Robitaille.

Boilly says Russell asked him to take him in his (the witness) house, he said he had nothing left, having given everything. This was about the 1st of November. He was, it may be said, insane (fou) then. It was rather after the 1st of November that he perceived Russell was deranged. He was then so considered by the neighbors.

Gravel saw him almost every day, and says that towards the end of November he was unable to attend to his business; that he was then very bad. From the middle of November he remained at his home, and ceased to attend to his business. He offered to sell and pressed the witness to purchase articles much below their value, saying he was going to board with Lefrançois.

Couillard says that in November, 1877, Russell invited him to his house, that was before his marriage with Julie Morin, and that from his incoherent conversation he, Couillard, thought Russell was not in his right mind. In the beginning of December, 1878, between the 3rd and the 7th of December, and certainly before the 7th, he went to Russell's house, and he found him *fou comme braque*, he was in the act of giving clothes to a young man who he said was his nephew. He complained bitterly, as a man out of his mind would do, that he was a lost man, that he had nothing left, and was in the street. He asked witness to take him with him, that he could not live

in this house, that they had taken away every thing from him. He said, "Take me any where, in your garret or your cellar, or put me in jail, any place for me will do." They both went into the kitchen and Russell told him, Couillard, "*Il* "*faut que je donne tout cela, ces vaisseaux de cuisine, ce poële,* "*rien ne m'appartient. Il m'offrit des cartes du St. Laurent. Je* "*l'ai refusé, je voyais que l'homme n'était pas dans son propre* "*génie.*"

Delphine Tessier lived at McMullen's, a neighbor of Russell; the yard was common to both. Russell came there at four a. m., asked her to tell McMullen to put his horse to his vehicle to take him to jail. He was in drawers, and had a fur coat on. This was in October or November, 1878. Two hours after he was still in the same dress in the street looking about. A few hours after Mrs. Robitaille or Mrs. Roy (a sister of Mrs. Robitaille) came to ask McMullen to go after him as he was going towards the river and she was afraid he would drown himself. Before this he had given a house to St. Michel, and offered it to McMullen before he gave it to St. Michel. From the manner he was acting in October and November he was insane, and every one considered him so.

McMullen says that about the time Russell gave his house to St. Michel he, Russell, frequently came to his house in the night, sometimes to shake hands, and he had to get up and go with him. Russell repeatedly inquired for Ellen, saying: "Poor girl, I have thrown her in the street." He offered him a cupboard, his shoes, and on one occasion he offered him his house, saying, "I am going to give every thing away, "I'll give you a share." This was in September, he thought Russell was not then in his right mind.

Boisjoli lived at McMullen's in the fall of 1878, saw Russell very often in the yard, which was common to both, and at McMullen's. Russell would knock at the window, call him in to kiss him. On one day witness went at Russell's to get an axe. Russell, who was up-stairs, called him to go up. Upon his answer that he had no time, Julie Morin asked him to go, making a sign with her finger towards her head to indicate that he was out of his mind. In the witness' opinion, he was insane from September, 1878, and was thereafter unable to do any transaction.

De Beaumont, a Notary, went to Russell's one day, when

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Russell told him that if he had come sooner he would have given him a house, which he had given to St. Michel; saw him often in October and November. He was always very much excited, complained of his losses, and his excitement was growing all the time.

Brown says that in the fall of 1878 Russell was not in a fit state of mind to dispose of his property. He met Russell in the street on the 26th or 27th of November, 1878, who told him he had made a will in favor of Julie Morin, and that he would have to give her all his property. On being asked why he did so, he said he could not help it, because he was afraid she would poison him. He asked him why he did not make another, and his answer was that Andrews told him he could not. Yet this was the third will he had made within two months.

Eliza Willock says in the early part of the fall of 1878 Russell was going in and out of her place and talking about one thing and another. She said to him, "You had better go home." He said he had no home. She said, "Mrs. Robitaille is at home." "No," he said, "I have no home, Ellen is not there." He said, "I have no home to go to, I have no wife, Ellen is not there." There was no snow on the ground then. She thought the man was not altogether sane.

Sometime after, on a Sunday, he came to the house, he was quite deranged. He said, when she insisted upon his going home, that he had no home. He wanted to remove his clothes to the place and remain. She said, "You had better go home, Mrs. Russell will be waiting for you." He said, "I have no home, Mrs. Russell is dead." He was much worse than the first time, and not sane at all. There was no snow on the ground, it was long before Christmas.

Sylvestre saw Russell one day at his, Russell's, house. St. Michel was there, and after St. Michel was gone Russell told the witness that he had given his house. The witness adds that he, Russell, was upside down, "*Chaviré, chaviré.*"

It is impossible to give an analysis of every deposition. These are brief extracts of the evidence of the neighbors, of pilots and old friends who had known him for twenty, thirty and forty years, and who have not the slightest interest in the case. I have purposely refrained from alluding to the testimony of Ellen Russell, who, although not an incompetent

witness, has such direct interest in having the will set aside that she may have been biassed in some of her appreciations of the circumstances of which she has spoken in her evidence. Nor did I allude to that of Austin, who was Russell's Notary and Defendant in this cause. Their testimony alone with that of Dr. Russell would be quite sufficient to set aside the will. But apart from their evidence, I cannot, from the other testimony and all the circumstances of the case, come to any other conclusion than that both before and after the 27th of November, and, to use the language of Demolombe, a very short time before and a very short time after that date, Russell was completely out of his mind and unable to attend to his ordinary business, and far less to make a will.

I think it is proved that the very day the will was made Russell was incompetent to make a will, Brown and Dr. Russell both say so, and they speak as to the precise date; but it is not necessary to go that length. In the case of *Waring & Waring*, 6 Moore P. C. C. 354, the circumstances of which bear strong resemblance to the present case, the learned Judge who delivered the judgment of their Lordships said, p. 357: "Thus it becomes impossible to disconnect the different "periods of this unhappy person's history; there is every "probability that the diseased state which commenced before "the *factum* continued up to its date; the likelihood is that "the delusions of which evidence exists, before and after, "continued during the intermediate time, although no proof "may be obtained of the precise fact, and all presumptions "which would otherwise have been in favor of sanity at that "date are turned the other way by these important circums- "tances. Hence it is not at all a just and correct view of this "case which affirms that the presumption is in favor of the "testatrix's soundness, and the proof of continued delusion is "thrown upon those who deny it, merely because there is "no evidence directly applicable to the date of the will. No "one who finds a person *laboring under the same kind of de- "lusions before and after a given period* can be justified in re- "fusing his belief to their continuance during the interval "unless clear evidence be produced of their having ceased "for a time and then returned."

At p. 368, "The result of the whole evidence, when exa- "mined and compared, is that this testatrix was of unsound

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"mind some years before the *factum*, and that she was of the "same unsoundness after the *factum*, a prey to delusions, "and of unsteady, unsound and wandering intellect............ ".. Therefore the Appellant "must in the case prove her to have had a lucid interval "between November, 1833, perhaps we should rather say "between February, 1834, and the date of the will, March of "that year, and that this lucid interval continued to and in- "cluded the first of March. Now BY A LUCID INTERVAL IS NOT "MEANT A CONCEALMENT OF DELUSIONS; BUT THEIR TOTAL ABSENCE, "THEIR NON-EXISTENCE IN ALL CIRCUMSTANCES, A RECOVERY FROM "A DISEASE AND A SUBSEQUENT RELAPSE."

Troplong, Donations and Testaments, No. 458, conveys the same idea in still more forcible terms.

"Divers textes du droit romain (says this writer) ont parlé "d'intervalles lucides. Un passage de Celsus nous avertit "qu'il ne faut pas les confondre avec l'ombre du repos (*inumbria* "*quies*) qu'éprouve quelquefois le furieux. Ce n'est pas une "tranquillité superficielle, une prostration du mal, ou une "rémission accidentelle et passagère qui constituent l'inter- "valle lucide. Il faut une véritable guérison, c'est-à dire un "retour de raison qui soit la santé même de l'esprit et dissipe "les illusions et les erreurs dont il était obsédé."

In *Waring & Waring* the interval for which there was apparently no evidence was from November, 1833, or February, 1834, to October, 1834, a period of from eight to eleven months, while here, even rejecting the evidence of Dr. Russell and of Brown, the interval for which there is no evidence as to precise dates would not cover more than a few days before and a few days after the 27th of November, 1878, the day when the will was made. In this case, the Respondents have neither alleged nor attempted to prove that the will was made during a lucid interval.

Their whole efforts were directed to establish that Russell was of sound mind all the time, until a few days before his interdiction.

In support of this contention they invoked the transactions he has entered into between September, 1878, and January, 1879, and also the testimony of the witnesses they have produced.

The transactions of Russell during that period are not nu-

merous; they consist in three wills, two of which are unreasonable, and the other was made at the solicitation of his niece, Ellen Russell, at a time when, according to Dr. Russell, "*he could be led in any direction.*" I do not wish to express any opinion as to the validity of the two wills of the 4th and of the 8th of October, nor whether the suggestions and solicitations of Ellen Russell were of that character as would be sufficient to annul a will. These two wills are not in question in the case, and I only speak of them as bearing upon the evidence of the state of mind of the Testator. The making of three totally different wills in less than two months, when no change whatsoever had taken place in the circumstances of him who made them, is a strong indication, to say the least, of an unsettled state of mind. The conveyance by Russell of his house to St. Michel, and his refusal to receive on the 23rd of November the notes of the Banque Nationale without consulting his lawyer, were two other irrational acts, which can only be explained by the insane delusions to which Russell's mind was then subject.

The sale of the Union Bank shares was made by St. Michel on the 6th of November, and St. Michel also assisted him (See Shaw's testimony) when he received, on the 18th, a sum of money from the Sheriff. The transaction with St. Michel, on the 12th of November, were arranged by Dr. Russell and effected with the assistance of Austin, Russell's Notary. The same may be said of the power of attorney given to Lefrançois on the same day. Although there is no direct evidence to that effect, this power of attorney must have been given to prevent the recurrence of such transactions as had been made with St. Michel, and because it was felt that Russell was unable to attend to his own business.

There remain two receipts for interest which Russell gave, one on the 2nd of October, which was made in French by Gauvreau, a Notary, and the other by himself, about the first of November. Of these eleven transactions, of which the will of the 27th of November is the last, four may be said to have been either irrational or unreasonable, five were made either at the suggestion or with the assistance of Russell's friends, and two only, and the least important, without assistance.

A peculiarity of insane persons who, like Russell, believe themselves to be ruined is their desire to receive money and

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convert everything into money, believing that what they so convert is so much saved from the wreck. This disposition is strongly manifested troughout by Russell, even to the extent of giving a valuable property to St. Michel to avoid disbursing a small sum which he could well afford to pay; it is shown in the sale of his Union Bank shares, at a great sacrifice; in his anxiety to receive the amount due him by the Sheriff, and the strange manner in which, on receiving the $400 from St. Michel, he, without counting the money, hurriedly placed it under a pillow, as if he was afraid any body should know he had that money. It is not therefore surprising that when the two small sums of money were offered to him for interest he should have accepted them without exhibiting any sign of mental aberration.

With regard to the oral testimony, fourteen or fifteen of the Respondent's witnesses say absolutely nothing as to the state of Russell's mind. Seven or eight others saw him occasionally, some of them by meeting him in the street and some by going into his house. They had but short conversations with him each time, and did not notice any change in his intellect. Davis, one of them, saw Russell three or four times while he was sick. Russell paid him his rent on one of these occasions. Each time he was very much excited.

Emilie Tremblay saw him several times, not very often. On one occasion, in the summer 1878, he was sick, he wanted to give all his property and go and reside with Lefrançois. He sent for her to consult her about it. She advised him not to do it. His trunks were ready to pack his goods in. She only discovered he was wrong on Christmas day when he came to her house. Régis Roy only found there was something wrong with him on New Year's day, but Roy is not a great observer, for in the course of thirty-six years that he knew Russell he only saw him once the worse for liquor; while Vallières, who saw him frequently in the fall of 1878, says that he hardly saw him twice or three times without finding him once in liquor. St. Michel, on the other hand, says that for ten months before his interdiction, Russell did not take any liquor; while Lefrançois saw him in liquor, more particularly since 1877, but he thinks that he did not drink in the fall of 1878. They cannot all be right, and it is quite possible that the excitement in which he was seen by several of the Res-

pondent's witnesses may have been caused by the unbalanced state of his mind, rather than by the excessive use of liquor.

Lemesurier saw Russell about the 20th of November. He helped him into the street cars, and Russell asked him to go as far as his house to help him to get out. He complained of suffering very much, otherwise he was as he had always been.

Hélène Fournier paid him some interest about the first of November ; he appeared to be as usual and all rigt. Beaulieu and Paré only saw him to speak to him in the street. They found him as usual.

The other witnesses are four persons who were the *Syndics* or Trustees for the construction of the Parish Church of St. David de l'Aube. They came to Russell about the 17th of November, with Rev. Mr. Martin, their Curate, and Father Sexton to borrow $4,000. Their evidence is not very clear,but it would appear that after some conversation they were referred to Mr. Austin, Russell's Notary, and the loan was refused, because they could not give a first mortgage. They all say that Russell appeared to them to have the full exercise of his faculties. They did not know him before. The interview lasted between three quarters of an hour to an hour. This interview has been spoken of as a strong indication that Russell, up to that time, enjoyed his facuties. This, however, seems a very ordinary circumstance. It is not at all surprising that Russell should have been somewhat awed by the presence of two priests and so many strangers in his house, and that this should have placed him on his guard. He, however, it appears, could not decide without the assistance of his Notary whether he should make this loan or not, and on the whole what these witness say can have very little weight, owing to the fact that they did not know Russell before.

Nolet is a witness who states that on the 27th of November he was at Russell's house ; he was told Russell was gone to the Lower Town. He was surprised at that, as Russell was suffering so much from his sore leg. When Russell arrived he said that he had been obliged to go to the Lower Town, and that things might turn as they pleased, his affairs were now settled, without saying what it was that he had settled. He saw Russell every day from the 19th of November to the first of January, and it was only on the 28th of December

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that he perceived that Russell was deranged. Before thist last date, he was as usual and in his right mind. This witness, however, admits that in November, and also in December, he heard several respectable persons say that Russell was out of his mind. Plante, Boilly, Sylvestre said so. They are all respectable persons.

If what this witness says is true, Russell, in saying that his affairs were arranged, must have meant that he had made his will on that day, and that he was glad to have done so. This is in direct contradiction to what Russell said to Brown in the street, immediately after making the will. Nolet is an old man of seventy-five years of age, Brown a man of forty-seven years of age. Both are pilots, and both were old friends of Russell. If both told the truth, and nothing has been urged against the character of either of them, it would follow that in the short space of from half an hour to an hour Russell had entirely forgotten that he had said to Brown, in the way of complaint, that he had been forced to make a will in favor of Julie Morin, because he was frightened lest she might poison him, and declared himself to Nolet perfectly satisfied that he had settled his affairs. If this be so, he must either have been out of his mind, or what he said to Nolet must have been said through fear of Julie Morin, who was then in the house. It is impossible to conciliate those two statements, and there is no reason to reject the one more than the other. Taken together they only prove the vagaries and wanderings of Russell's mind on the 27th of November, the day the will was made.

We now come to two important witnesses, St. Michel and Lefrançois.

St. Michel, from the month of September, 1878, to the month of January, 1879, went almost daily to see Russell, who was sick. We have seen that he had transactions with him, and that he assisted him in some other of his transactions. He had no doubt ample opportunity to see and to judge of Russell's state of mind. About the end of November, 1878, Russell told him that " he had been in the Lower Town on the day before, " that he had made a will, and that he was very satisfied that " he had put all his affairs right. " It was impossible to have a better judgment than Russell had on that day. There was no difference whatsoever between the state of his intellect on

that day and what it had been during the preceding thirty years that he had known him.

This is a strong certificate of Russell's capacity; but St. Michel is the same person to whom Russell gave a house for nothing on the second of October, the same house which he had offered before to five or six persons who refused it, because they felt he was out of his mind; the same house which Wallace found so cheap at $700 that his partner would likely have purchased, if Russell had not been so excited as to make them believe that he was not all right. St. Michel is the same witness who says that on the 30th of Sept., 1878, Russell sent for him and told him that he wanted to give him all he had to go and live with him, and insisted so much that he had to tell him that he would speak of it to his wife, knowing very well that his wife would not consent; and she did not consent. Yet two days after St. Michel accepted his house as a pure gift, for which he had later to give $400 and still made a handsome profit in less than two short months. Mr. St. Michel is a man of some means and standing in the community where he lives. It would not do for him to be caught in an attempt to spoliate a poor old crazy man of a valuable property, hence the coloring which he gives to his transactions with Russell, by varying in his testimony the consideration mentioned in both the deed of the 8th of October and that of the 12th of November, by tacking upon them unwritten conditions which could not bind him. He is bound by the deeds which he has signed and by the declarations they contain, and the opinions which he expresses in his deposition as to the sound state of mind in which he always found Russell up to the second of January, 1879, are at complete variance with rational deductions and inferences to be drawn from those deeds, from the certificate which he himself required from Dr. Russell before signing the deed of the 12th of November, and the other circumstances related by himself, such as Russell's proposition to give him all he had to go and live with him, his constant allusions to his business and his anxiety about his money, to the extent of saying that he would withdraw or collect all his monies. Theseare significant facts to which the opinions of the witness must give way, when as we have seen they are at variance with those facts.

Another small circumstance in St. Michel's testimony deserves to be noticed.

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St. Michel says that Ellen Russell told him she had received from her uncle $600, with a gold watch and a silver butter cup; that she told him this on the day she received the money. (She says in her deposition her uncle gave her $500 on the 8th of October.) Whether it was at the same time or on another occasion, St. Michel says that between the passing of the two deeds between him and Russell, that is between the 2nd of October and the 12th of November, 1878, she asked him to give her back the house ("de lui rendre la maison"), that is the house which Russell had given him. He adds that he was willing to give it to her, but had to consult her uncle, and that on speaking to Russell about it Russell said: "She will not get it, and you tell her, Ellen, that she "won't get the house, and tell her also that I don't wish to "see her here any more."

Either this is true or it is not. If it is true it shows that Russell, who had told Doyle to bring his sister-in-law Ellen Russell to his house, that he wanted to see her, and who, when she came, on the 8th of October, gave her $500 or $600 in cash, a gold watch and chain, and made on the same day a will by which he had bequeathed to her the whole of his property, with the exception of what was comprised in a few small legacies, was within a few days so excited against her as to send her a message that he did not want to see her any more, and that he actually forbid St. Michel from giving her a house which St. Michel was willing to give to her, must have been entirely out of his mind, since there is not a single circumstance to justify such a change in his dispositions towards his niece in such a short interval. If this story is not true, its fabrication must affect the whole of St. Michel's testimony. Russell must have been insane or St. Michel must have perjured himself.

Lefrançois, who was at one time a brother-in-law of Russell, saw him every day during the months of September and of November, 1878, and sometimes twice a day. Russell gave him a power of attorney. They often spoke of business. He swears positively that if Russell was insane then, he had been insane during the fifty years that he had known him. In October or November Russell told him to say to Ellen Russell to employ the money he had given her to remain at the convent or elsewhere, for she would

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never get anything more from him. Yet on the 30th of December Russell crossed to Point Lévis and asked Lefrançois to send for Ellen Russell, and when she came he kissed her affectionately and spoke a long time with her. He had not then lost his reason. It is only on the 2nd of January, 1879, that he perceived that Russell was becoming troubled. Steps were being taken several days before this date to have Russell interdicted, and this witness, who was every day at Russell's house, and who had a power of attorney from him, was not aware, it appears, of these proceedings. All this seems inexplicable. Lefrançois admits that in October Russell wanted to come and live with him to save the expenses of housekeeping. The same idea that he could no more afford to keep a house must have been lurking in his mind then.

Lefrançois is the Plaintiff in the cause, and although his sister was married to Russell it does not appear that he is any connection whatsoever to the Russell family. This witness gives no facts from which the Court may judge whether the opinion he has formed of Russell's state of mind was well founded or not. His opinion is decidedly favorable to the will. There is this, however, to be said, this witness heard of the transaction with St. Michel, but never knew or inquired of the conditions. He has not heard nor seen anything of what twenty other witnesses testify to have seen and heard.

The testimony of the two Notaries who received the will is also important. Mr. Andrews, one of them, went to Russell's house, where Russell gave him the instructions to prepare his will, by which he intended to give $400 or $500 dollars to each of his three nephews and one niece or two nieces, the whole amount not exceeding $2,000, and the remainder of his property to his wife, Julie Morin; he says that on asking Russell if he would come to execute the will on the next day, Russell said no, that he would go to his office. Russell went the next day, 26th of November, to his office, and requested him to strike out the legacies proposed for his nephews and nieces, whom he said had no gratitude for him, and to give the $2,000 intended for them to Father Sexton for the poor of the Parish of St. Roch's. Russell came back on the next day, when the will was executed before himself and Glackmeyer, who acted as the second Notary. Russell told him on this occasion to have everything in form, for he was sure

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his relatives would contest the will, and he gave him the certificate of Father Sexton to keep; this certificate was by him attached to the minute of the will.

Glackmeyer saw Russell when he came to execute the will, on the 27th of November, and spoke to him for about half an hour while he was waiting for Mr. Andrews' arrival. When Mr. Andrews came the will was signed in their presence. Both knew Russell before, and say that he was in his right mind and as they had always known him.

Neither the production of the certificate nor the sudden change of Russell's mind as regards his nephews and nieces did surprise Mr. Andrews, and he apparently attached no importance to these circumstances.

However important the evidence of the Notaries may be, all the authors agree that it is not conclusive, and does not exclude the proof of insanity. Demolombe, vol. 18, No. 365; Troplong, des Donations et Testaments No. 472; Merlin, Rep. vo. Testament sect. 1, § 1., art. 1.

In *Harwood vs. Baker* (3 Moore P.C.C., p. 282, and in *Prinsep* and *The East India Company vs. Dyce Sombre and others*, 10 Moore P. C. C. 232) the effect of testimony of the solicitors who received the instructions and assisted in the execution was fully considered, and in both cases, notwithstanding their most positive testimony that when these testators made their respective wills they were of sound intellect, the wills were set aside for want of capacity.

In the case of *Close and Dixon* (17 L. C. J. 59) the will was set aside, notwithstanding the concurrent testimony of the priest who had administered the Sacrament of Extreme-Unction to the testator within a few days of the making of the will and of the two Notaries that the testator was of sound mind when he made his will. This judgment was unanimously confirmed by this Court in December, 1876.

As Troplong, says: ...." le notaire ne se prononce que " sur les apparences. Or, en matière de démence, rien n'est " plus incertain que les apparences."

In *Waring vs. Waring*, 6 Moore P. C. C. 354, a passage is cited from Dr. Willis' work on mental derangement to show the power which lunatics possess to restrain for a time their imagination and to conceal their delusions.

Father Sexton, to whom Russell left $2,000 for the poor of

St. Roch's, is the last witness we have to allude to. This witness saw Russell frequently during his illness. He never saw anything wrong with him. However, he confesses to having a bad memory, and this is made evident by the whole of his answers. He thought Russell was all right when he gave him the Communion on the 26th of November, otherwise he would not have given it to him. He does not recollect to whom he gave the certificate of the 27th of November, but it was not to Russell. The certificate was given in the "*sacristie*" to some person who asked for it. He does not know for what purpose the certificate was given, and it is not usual to give such certificates. The Communion was given to Russell at his house, because he could not go out of his house. In this he agrees with Dr. Russell, who says that Russell was unable to go out then, and that if he had gone out he would have gone without his permission and without clothes on. And yet on the 26th, and again on the 27th, of November, Russell went to Mr. Andrews, the Notary, to make his will, and on the second of those days he took with him Father Sexton's certificate.

Who got this certificate for him?

Who gave him his clothes and dressed him to go out?

What induced this poor old man, suffering intense pain, as shewn by Lemesurier's deposition, who could not go to his church a few hundred feet or yards distant from his house, ta take the Communion, who had on several recent occasions caused the Notaries to execute their deeds at his house—to go twice to Mr. Andrews' office, a mile or two away, to sign his will?

Why did he go to Mr. Andrews instead of his going to Mr. Austin, his own Notary?

Of all this, there is no satisfactory explanation to be found in the record. There is not, it is true, any direct evidence of suggestion, that is, of that fraudulent suggestion sufficient to annul a will. Russell lived alone with Julie Morin and her sister, a Mrs. Roy, and neither of them has been examined. It was next to impossible, with persons so situated, to prove either suggestion or violence. It is proved, however, that Julie Morin entertained strong feelings against Ellen Russell; that she closed the door in her face, refused to allow her to see her uncle, and said if she came to the house she would scald

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her, and on one occasion when Doyle, Ellen Russell's brother-in-law, called there to see Russell, he was refused admission. It is impossible to read the evidence without feeling that this will was made under very suspicious circumstances, and that strong pressure must have been brought to bear upon this unfortunate old man to execute it. These circumstances add weight to the testimony of Brown, who says that Russell told him on the day he made his will that he had done it because he was afraid of being poisoned. Such a declaration could only emanate from a diseased mind, smarting under some pressure exercised upon him with regard to this very will.

The witnesses ot the Respondents, including the two Notaries and Father Sexton, merely establish that they did not see Russell do or hear him say unreasonable things; that is, they did not see him commit any act of folly, and, therefore, they concluded that he was in the enjoyment of his faculties. This, however, is nothing else but negative evidence. It is in many particulars contradictory, and it cannot prevail on the affirmative testimony of so many witnesses who saw Russell do things which no other but a madman would have done, or say what cannot be accounted for except on the assumption that he was out of his mind.

Troplong *loc Cit.*, No. 450, says: " Il est vrai que le fou n'est " pas incapable de raisonnements justes au milieu de sa grande " folie. On voit des insensés qui associent des idées raison-" nables à leurs idées extravagantes et qui mettent de la lo-" gique dans leur démence même." And he cites approvingly this sentence from D'Aguesseau, " Un fou peut faire de actes " de sagesse; un homme raisonnable ne peut faire d'actes de " folie."

In making this last will Russell did not even make " *un acte de sagesse*, " for under all the circumstances it was a most unreasonable will.

The debatable question of the effects of partial insanity does not arise in this case, for the hallucinations of Russell, if they were mere hallucinations, affected his capacity to make a will. A man who at times supposes he is ruined and has nothing left in the world, and at other times is disposed to give everything he has to whoever he happens to meet, is certainly not in a fit state to judge of the property he has to give and of the several claims of those who are entitled to it.

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After a most careful consideration I have been able to give to this case, I cannot come to any other conclusion, but that when Russell gave his instructions on the 26th, and when he executed his will on the 27th of November, 1878, he had not that degree of mental capacity required to make a will, and which Sir James Hannen described, in addressing the jury, in the case of *Broughton & Knight*, when he said : " Whatever degree of mental soundness is required for any one of " those things, responsibility for crime, capacity to marry, " capacity to contract, capacity to give evidence as a witness, " I must tell you, without fear of contradiction that the highest " degree of all, if degree there be, is required in order to " constitute capacity to make a testamentary disposition ; and " you will see why, because it involves a larger and wider " survey of facts and things than any one of those matters to " which I have drawn your attention. " Meaning, thereby, that it required as high a degree of mental capacity to make a will as was required for any of those matters to which he had referred.

I find the evidence of Russell's incapacity in his extravagant conduct a very short time before he made his will, in the fact that he was interdicted a short time after he had made it, and for the same causes and symptoms which, according to a number of witnesses, had been noticed by them before the will was made.

I find the evidence of it also in his transactions with St. Michel, in the unsettled state of his mind as regards the final disposition of his property, and which prompted him to make three, and I might say four, totally different wills in the short interval of a little over one month, without any change whatsoever having taken place in his circumstances. I find it also in the very extraordinary productions of the certificates procured by interested parties to establish that he was not insane, as if they themselves had some suspicion of it.

I also find it in the various expressions of praise and of contempt which at very short intervals he alternately used towards Julie Morin, and of affection and coldness or hatred towards his niece, Ellen Russell, and particularly in the unreasonableness of his last will, by which he not only deprived his own relatives of a fortune of some $12,000 to $15,000 to give it to a woman with whom he had only been

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married for a twelve month, and for whom he had considered that $400 was a sufficient marriage settlement, but also in the fact that he even took away the $2000 which he had proposed to give to his poor relatives, his nephews and nieces, to give them for distribution among the poor of the parish, to whom he was under no obligation to give such large proportion of his estate, and, finally that this will is contrary to the repeated declarations of his intention to leave his property to Ellen Russell. On this ground of insanity I would reverse the judgment of the Court below.

But there is another ground which, supposing Russell had been in the full enjoyment of his faculties, would be sufficient in my opinion to set aside his will; it is the error in which he was of the quality of his legatee, Julie Morin. In his will, he calls her his beloved wife, and she was not his wife, but the wife of another. Is it to be supposed for an instant that if Robitaille had returned from the United States and claimed Julie Morin as his wife before the will was made that Russell would have given her his whole property? What would, in that case, have been his feelings of any person in his senses, they would have been that he had been grossly deceived by her representations, that she was either a spinster or a widow, and that he had been disgraced by her deception. It is in vain to pretend that she may have been in good faith. Russell must be presumed to have been in good faith unless the contrary be proved; but the presumption of good faith does not lie in favor of a party who, being already married, marries a second time. It was incumbent upon the Respondent to prove from what source she derived the information, if any she had, of the death of her hushand. There is not a scintilla of proof in the record about the death or disappearance of her husband nor about her antecedents. In the eyes of the law she must be considered as claiming an estate under a title which never belonged to her, that of having been the legitimate wife of Russell, whom she induced to marry by her false representations that she was free from any marriage bonds.

Merlin, in an article to be found in *Guyot* vo. Legs, pp. 405 & 406, after citing several provisions of the civil law, which at first sight seems conflicting with one another, says:

" Pour concilier ces textes avec ceux que l'on a précédem-

" ment cités, il faut, dit Voet, distinguer le cas où le testateur " a appelé son fils ou son frère, un légataire qu'il savait bien " n'être point tel, et qu'il aimait néanmoins comme s'il l'eût " été réellement, d'avec celui où, *trompé par de fausses appa-* " *rences*, il a gratifié comme son fils ou son frère, une personne " qui n'avait point cette qualité et qu'il aurait passée sous " silence s'il avait su qu'elle lui était étrangère." C'est au premier cas qu'il faut appliquer les lois 58, § 1 D, *de haeredibus instituendis*, et 33 D. *de conditionibus et demonstrationibus ;* et c'est au second que s'adaptent les lois 5 C, *de testamentis*, 4 et 5 C, de *haeredibus instituendis*. (Merlin vo. Legs, sect. 2, § 2, 4. Furgale, des Testaments, ch. 5, sect. 4, 7 et 15. Troplong, loc. cit., No. 502.

When Russell, in the full enjoyment of his faculties intended to make Julie Morin his wife, thought it was enough to give her $400 by their contract of marriage, it is not at all probable he would have given her $12,000 or $15,000 if he had thought she was not his wife.

On this second ground on which the Court below did not adjudicate, I would also reverse the judgment, to the extent of declaring the universal legacy made to Julie Morin null and void. I do not agree with the view taken by the Court below that, as Lefrançois would still remain Executor, and the action would still be well brought by him, if the universal legacy to Julie Morin was alone set aside, therefore the intervention must be set aside. There are two distinct issues raised in this case, one with Lefrançois as to his right to execute the will, which must depend upon the validity of the will, and the other with Julie Morin, which depends upon the validity of her legacy. The latter issue might have been tried independently of the other, and although the contestation of the Appellant might have been rejected as to Lefrançois, the conclusions which she has taken in her Declaration against Julie Morin might have been maintained if her allegations of facts and her legal propositions were well founded, as I think they are. I am, however, alone in my opinion, and the judgment will be confirmed.

Tessier, J.—Pour mettre de l'ordre dans l'examen de cette importante cause, il me semble utile de considérer en premier

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lieu, si l'Intimée Julie Morin,légataire universelle de William Russell, était, à l'époque de son mariage et de son testament, la femme légitime de Russell, suivant le droit civil et le droit canonique ; si cela est vrai, les conclusions que l'on essaie de tirer du manque de sens et de sagesse dans son testament en préférant sa femme à sa nièce disparaissent.

En second lieu, William Russell, à la date de son dernier testament, 27 novembre 1878, était-il sain d'esprit ? En supposant même qu'il ait eu des moments indiquant la folie, était-il alors dans un intervalle lucide suffisant pour la validité de son testament ?

En dernier lieu la liberté absolue de tester, introduite par notre législation statuaire, contraire à l'esprit de l'ancien droit français, ne rend-elle pas un testament valide en loi, quoiqu'il soit injuste, si le Testateur était *compos mentis ?*

Sur le premier point on trouve que dans les régistres publics des mariages, dont il a été produit un extrait du 26 novembre 1877, l'Intimée est dénommée *Julie Morin*, *veuve d'Etienne Robitaille.* Ce régistre a été signé alors par William Russell, par les témoins, entr'autres Joseph Rousseau et par le prêtre, le Révérend M. Sexton. L'Intimée est donc en possession publique de cet état civil ; il n'y a pas de preuve pour contredire cela, au moins suffisante. Dans le contrat de mariage du 21 novembre 1877, rédigé en anglais, elle est dénommée *Dame* Julie Morin, ce qui implique qu'elle avait été précédemment mariée.

Le Juge-en-chef Merdith a dit sur ce point : "It is deser-" ving of remark that Russell asked three of his old friends "(brother pilots) to be present on the occasion of his intended " marriage, and that no one of them suggested a doubt as to " Madame Robitaille being a widow, nor does it appear that " any one suggested any such doubt. I cannot therefore regard " Julie Morin as having lived with Russell as a concubine..."

Sur les 72 témoins entendus, il n'y en a aucun excepté Ellen Russell, témoin intéressé, qui dise que le premier mari de Julie Morin était vivant. De fait, cet homme était Etienne Robitaille, était absent depuis une vingtaine d'années, et elle était considérée comme veuve et le croyait elle-même. George Lemelin, témoin de l'Intervenante Russell, dit : " Monsieur " Russell m'a dit qu'il était pour se marier avec widow Robitaille." " George, I am going to get married with

widow Robitaille." N'est-il pas naturel de conclure que si Lemelin et Ellen Russell eussent connu que le premier mari de cette femme vivait, c'était leur devoir comme catholiques romains et comme chrétiens d'avertir M. Russell et d'avertir le prêtre de la paroisse, soit avant, soit après le mariage? Ils n'en ont rien fait : il demeure donc constant que cette femme se croyait veuve et qu'ils se sont mariés de bonne foi. Ceci dispose du témoignage du vieillard Joseph Rousseau, présent au mariage, qui rapporte que Russell lui aurait présenté sa femme comme Mlle. Julie Morin et lui aurait offert $10 pour qu'il prît sa place. C'est évidemment un badinage fait à un vieillard de 81 ans.

Admettant donc le mariage contracté de bonne foi, quelle est la doctrine sur sa légitimité, quoique plus tard, au moins six mois après le testament, on a découvert que le premier mari de cette femme vivait, et qu'il a fait son apparition soudaine à Québec. Voici ce que dit Pothier, Traité du Contrat de Mariage, No. 437.

" Le cas auquel un mariage, quoique nul, a des effets civils, " est lorsque les parties qui l'ont contracté étaient dans la " bonne foi, et avaient une juste cause d'ignorance d'un empê- " chement dominant qni le rendait nul. On peut apporter " pour exemple le cas auquel la femme d'un soldat qu'on avait " vu, le jour d'un combat,couché parmi les morts sur le champ " de bataille, et qu'on avait en conséquence cru mort, quoi- " qu'il ne le fût pas, se serait mariée à un autre homme sur la " foi d'un certificat de mort de son mari en bonne forme, " qu'elle aurait eu du major du régiment. Si longtemps après, " et depuis qu'elle a eu des enfants de ce second mariage, son " premier mari qu'on croyait mort vient à reparaître, il n'est " pas douteux que le second mariage que cette femme a con- " tracté est nul, qu'elle doit quitter son second mari et retour- " ner avec le premier, son premier mariage qui a subsisté " toujours ayant été un empêchement dirimant du second, " mais quoique ce second mariage soit nul, la bonne foi des " parties qui l'ont contracté lui donne, par rapport aux enfants " qui en sont nés les effets civils que produisent les mariages " en donnant aux enfants, les droits de famille et tous les au- " tres droits qu'ont les enfants nés d'un légitime mariage."

No. 438. Pothier ajoute :

" La bonne foi des parties qui ont contracté un mariage

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" nul, donne-t-elle pareillement à ce mariage les effets civils, " à l'effet de conformer entre elles leurs conventions matrimo- " niales et de donner à la femme un douaire? Il y a même " raison. On opposera que les conventions matrimoniales " dépendent de la condition, *si mystiæ sequantur*, laquelle n'a " pas été accomplie, puisqu'on ne peut pas dire qu'elles ont " été suivies d'un mariage entre les parties, celui qui a suivi " n'étant pas un véritable mariage, puisqu'il est nul. La " réponse est que la bonne foi des parties qui l'ont contracté " supplée à la nullité de ce mariage, et fait regarder la con- " dition comme accomplie, de même qu'elle fait regarder " comme légitimes les enfants qui en sont nés."

La même doctrine existe par le Droit Canonique ainsi qu'on peut le voir dans le dernier ouvrage publié à Rome en 1880, du célèbre professeur *Philippus de Angelis*, qui fait autorité chez tous les catoliques.

Prætectiones juris canonici Philippus de Angelis.

T. III., tit. 17, p. 270.

" Nomine autem *justarum nuptiarum* veniunt tum matrimo- " nia in veritate valida, tum quæ *putative* talia habentur, " nempe in quibus ad valorem retinendum concurrit tum " probabilis communitatis credulitas, tum utriusque aut sal- " tem alterutrius parentis *bona fides*.

"......Proles, quamvis pro foro externo, ubi non constat de " illorum malâ fide, *habeatur pro legitima*........"

Je reviens maintenant au point principal, savoir, si Russell était sain d'esprit au jour du dernier testament.

Sans entrer dans le détail des faits pour lesquels il est mieux de référer au dossier, il me suffit de qualifier la différence des preuves de part et d'autre.

La preuve de l'Appelante Russell est dominée par les témoignages d'Ellen Russell, du Dr. Russell et du notaire Austin.

Ellen Russell est directement intéressée ; son témoignage est contredit sur plusieurs points importants, entr'autres sur la cause de son départ de la maison du Testateur avant l'entrée là de Julie Morin, clairement prouvée être due à son obstination de recevoir Thomas Gilchen au domicile de son oncle, le Testateur, et malgré ses défenses.

Le Dr. Russell se contredit par le certificat qu'il a donné sur la santé du Testateur, le 12 novembre 1878, et par son témoignage que s'il fût sorti de sa maison le 26 et le 27

novembre 1878, il serait sorti tout déshabillé " *without clothes*," tandis que le fait de sa sortie seul ces deux jours-là pour aller chez M. Andrews, notaire, exécuter lui-même son testament en question, est avéré par 5 ou 6 témoins.

Le témoignage de M. Austin n'est pas clair, il y a des réticences, il se contredit par les actes écrits qu'il a exécutés lui-même pour Russell ; il n'y a rien dans la preuve de l'Appelante qui contredise la lucidité de jugement du Testateur le 27 novembre, le jour qu'il a fait son testament.

D'un autre côté la preuve de la part des Intimés est absolue, positive, certaine ; elle repose sur des faits et des documents authentiques. Prenons ces faits dans leur ordre chronologique.

Le 3 octobre 1878, Russell fait son testameut devant Maître Austin, en présence de Ellen Russell ; ce testament est invoqué par l'Intervenante Russell, elle le trouve alors sain d'esprit " of sound and disposing mind, " il dénomme son épouse Julie Morin, " my beloved wife. "

Mais ce jour-là même, Ellen Russell mécontente son oncle de nouveau aussitôt après le testament exécuté, par des expressions injurieuses à Julie Morin, que Russell repousse en disant : " no more of that talk. "

Le 28 octobre 1878 Russell révoque sa procuration à sa femme devant le notaire De Beaumont. Le 5 novembre 1878 Russell se rend au bureau du shérif, et reçoit $962 lui appartenant.

Le 6 novembre, Russell vend 252 parts dans la Banque " Union of Lower Canada " pour la somme de $1,491, à Mr. Shaw, notaire, qui jure que Russell était alors *compos mentis*.

Le 12 novembre 1878, Russell passe un acte de ratification en faveur de St.-Michel et reçoit $400 devant Mtre. Austin. Le même jour le Dr. Russell délivre à M. St. Michel le certificat " that Russell was in a sane state of mind, clear about busi-" ness affairs and capable to arrange and conduct any business " of his own. "

Le même jour 12 novembre 1878, Russell fait exécuter un autre acte devant Mtre. Austin, notaire, savoir, une procuration en faveur de son beau-frère, Pierre Lefrançois, le présent Intimé.

Le 17 novembre 1878, Russell a deux entrevues d'une heure chaque, avec quatre étrangers, étant les quatre syndics de

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l'église de la paroisse de St. Romuald pour demander à Russell un prêt d'argent. Ces quatre syndics, Dussault, Levasseur, Rouleau et Bégin témoignent que Russell a discuté l'affaire avec eux comme un homme tout-à-fait sain d'esprit, et qu'il a refusé la prêt parce qu'il trouvait la sûreté insuffisante.

Le 20 novembre le témoin, M. Lemesurier rencontre Russell, et cause avec lui ; il le connaît depuis 25 ans et dit : " I formed no other opinion... he appeared very much composed " and seemed to be suffering only from a sore leg. "

Le 23 novembre Russell exécute une quittance pour vente de propriété en faveur de Mme. Rousseau devant le notaire Larue ; ces deux personnes disent que M. Russell était alors sain d'esprit, capable de contracter.

Le 25 ou le 26 novembre le Testateur Russell se rend au bureau du notaire, M. Andrews, il ne l'y trouve pas, mais requiert sa présence chez lui pour lui donner instruction de préparer son testament. M. Andrews va chez Russell et prend ses instruction, " we were alone in the room and the doors were shut." Il indique qu'il veut donner $400 ou $500 à ses nièces Russell et le reste de ses biens à sa femme Julie Morin.

Le lendemain Russell seul, se rend lui-même au bureau de M. Andrews ; en l'attendant là, converse longtemps avec l'autre notaire Glackmeyer avec une parfaite intelligence. Lorsque M. Andrews lui lit le testament préparé, il fait retrancher le legs aux nièces Russell, en disant qu'il a changé d'idée à leur égard, qu'elles n'ont pas été reconnaissantes pour lui. M. Andrews jure : " I consider that he was in perfect mind and knew perfectly what he was doing. " M. Glackmeyer en dit autant. Tous deux n'avaient jamais parlé à Julie Morin, l'épouse de Russell avant l'exécution de ce testament et ne l'avaient jamais vue avec Russell. Que devient l'allégation que le testament est dû aux obsessions et à l'influence indue de sa femme Julie Morin ?

La veille ou le même jour le Révérend M. Sexton a vu M. Russell et jure qu'il était sain d'esprit, M. St. Michel en dit autant. Faut-il croire que ces quatre personnes se parjurent ?

Que veut dire sain d'esprit ; *sana mens*, *compos mentis*, des Romains. Je n'ai pas trouvé une meilleure formule que celle indiquée par Demolombe, vol. 18, No. 333. " Intelligence et " volonté ; comprendre et vouloir. Comprendre le caractère " et les effets de l'acte, ou testament ;

" Vouloir faire cet acte et pouvoir aussi manifester cette " volonté. "

Appliquons ces conditions au cas actuel.

Le Testateur Russell a-t-il compris le 27 novembre 1878 qu'il donnait $2,000 aux pauvres de la ville de Québec et le reste de ses biens à Julie Morin ?

A-t-il exprimé sa volonté de le faire ? On ne peut pas s'empêcher de répondre affirmativement, à moins de déclarer faux le témoignage positif, clair et certain des deux notaires, confirmé par 4 ou 5 témoins qui l'ont vu ce jour-là, la veille et le lendemain.

Quelqu'injustes que soient les dispositions de ce testament, peut-on pour cette raison le déclarer nul ? Admettre cela, ce serait une atteinte à la liberté de tester. Cette liberté est écrite et consacrée par nos lois depuis plus d'un siècle.

L'article 831 de notre Code Civil proclame cette liberté d'une manière absolue. Tout majeur sain d'esprit, capable d'aliéner ses biens peut en disposer par testament en faveur de toute autre personne..
Il faut donc se défier des autorités tirées des anciens jurisconsultes de France sur ce point, parce qu'ils ont écrit dans un temps où les lois limitaient la liberté de tester.

Il en est de même de l'influence légitime exercée par des personnes qui ont la confiance du Testateur, pourvu qu'il n'y ait ni dol ni fraude. La haine ou l'injustice du Testateur ne sont pas des motifs suffisants d'annuler un testament. Les juges n'ont pas le droit de prononcer des nullités que la loi ne prononce pas. Demolombe au vol. 18, No. 347.

Toullier, vol. 5, No. 717 dit : " On avait introduit dans les " coutumes de France un moyen d'attaquer les testaments, " lorsqu'ils étaient faits en haine des héritiers présomptifs... " c'ètait l'action *ab irato*......

" Le Code garde le silence sur cette action...... Comment " donc les Juges pourraient-ils admettre cette action sans " excéder leurs pouvoirs ? Comment pourraient-ils créer une " nullité qui n'est pas prononcée par la loi ? "

Demolombe, 18 vol., No. 348. " Hélas ! dit-il, on serait vite " emporté bien au-delà, si l'on prétendait considérer comme " n'étant pas sain, d'esprit tous ceux qui se laissent conduire " par les passions et non par la raison ; tous ceux dont l'hu-" meur est sombre, inquiète, soupçonneuse...

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" Les dispositions elles-mêmes n'attestent que trop souvent " toutes ces variétés des vices de notre organisation et des " imperfections misérables de notre nature ! Combien n'en " voit-on pas qui sont peu explicables ou plutôt inexplicables? " Combien sont l'œuvre de la partialité aveugle et de l'injus- " tice ?......

Il cite plusieurs arrêts.

" Mais il faut en prendre son parti, comme le législateur a eu " lui-même la sagesse de le faire ! on ne pourrait atteindre ces " abus, qu'au moyen d'une sorte de révision, à laquelle il " faudrait soumettre, devant la justice, les dispositions à titre " gratuit ; or il est facile d'apercevoir les dangers bien autre- " ment graves de cet autre régime, et que pour prévenir les " abus de la faculté de disposer, il constituerait une atteinte " profonde à cette faculté même, c'est-à-dire, à la liberté civile " et au droit essentiel de la propriété.

" Dès là donc que le disposant était sain d'esprit il a été " libre de disposer comme il l'a voulu ! plus ou moins sage- " ment, plus ou moins injustement ! Nul n'a le droit de scru- " ter ses motifs ni de juger sa disposition pour le réformer."

Ellen Russell avait bien mérité de son oncle jusqu'en août 1877, mais à cette époque elle commence à commettre des actes de désobéissance, à recevoir chez lui quelqu'un contre la volonté de M. Russell, elle se sert d'un langage offensant pour lui. N'y a t-il pas là un motif raisonnable pour Russell de changer ses affections et ses dispositions. Malgré cela il lui a donné de main à main $500 à $600, une montre d'or. Ellen Russell est intéressée à montrer que sa sortie de chez son oncle en août 1877 est due à Julie Morin, mais il est bien constaté que sa sortie est due à une autre cause et qu'elle a eu lieu avant que Julie Morin soit entrée dans la maison de Russell. Ceci est bien expliqué par plusieurs témoins, entr'-autres Madame Siméon Rousseau (page 45 Appendice.)

" Je me rappelle que Russell est venu chez nous un matin, " il avait l'air bien malcontent ..... Je lui ai demandé com- " ment est Melle. Russell, sa nièce. Il dit : elle n'est pas chez " nous. J'ai dit : comment ce que ça se fait ? Je ne croyais " pas qu'il parlait clairement, alors il dit : Melle. Russell n'est " plus chez nous, je l'ai jetée dehors avec tout son butin."

Q. Vous a-t-il dit pourquoi ?

R. Je lui demande : " Pourquoi avez-vous fait quelque

" chose de même, je ne vous crois pas. " Il dit : " Mademoiselle Russell n'est pas une gentille fille ; j'ai gardé cette fille-là depuis l'âge de sept ans, à venir jusqu'aujourd'hui. Je l'ai toujours gardée en demoiselle, elle a toujours fait ce qu'elle voulait, elle a toujours eu ce qu'elle voulait de moi-même, juisqu'à aller à la banque avec mes livres. Elle était une demoiselle chez nous, elle faisait çe qu'elle voulait ; mais elle a reçu chez nous un nommé Gilchen, un garçon auquel j'ai défendu de fréquenter la maison, et je l'ai mise à la porte pour cette raison-là. " Un jour il dit j'étais descendu pour piloter un bâtiment, et il devait monter par les chars aussitôt qu'il pourrait. Il était arrivé chez lui vers onze heures du soir. Il a aperçu de la lumière chez lui par la porte. Il dit qu'il est rentré chez lui, qu'il a trouvé M. Gilchen dans la cuisine avec mademoiselle Russell en chemise, et il dit que ça ne convenait pas pour une demoiselle, qu'elle était avec monsieur Gilchen à qui il avait défendu de fréquenter la maison, et qu'il l'avait jetée dehors, que c'était une chose qui était contre ses règlements. C'est la raison pourquoi il l'avait mise à la porte avec son butin, et jamais elle ne mettrait le pied dans la maison.

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Q. Vous rappelez-vous vers quel temps il vous a dit ceci ?

R. Non, monsieur, je ne peux pas vous dire.

Q. Est-ce que c'est arrivé lorsqu'il était marié avec madame Robitaille ?

R. Il ne l'était pas encore.

Q. Madame Robitaille restait-elle là dans ce temps-là ?

R. Non.

Q. Est-ce qu'il y avait d'autres que monsieur Russell chez madame Russell dans ce temps-là ?

R. Je n'en ai pas vu d'autres.

Q. Restiez-vous près de chez lui ?

R. On restait dans la maison qu'on avait achetée de lui sur la rue St. Joseph.

Q. Est-ce que monsieur Russell vous a jamais parlé dans aucune circonstance au sujet de mademoiselle Russell ?

R. Dans le même temps, il m'a dit aussi que ce n'était pas le fait d'une nièce pour qui il avait été si bon, qu'un jour M. Gilchen arrive là pendant qu'il était bien malade, qu'il ne pouvait pas descendre, il s'est approché près d'un trou de tuyau, et il a prêté l'oreille et il a entendu la conversation ;

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monsieur Gilchen a demandé à mademoiselle Russell comment était monsieur Russell, et il m'a dit que mademoiselle Russell a dit : " Je pense bien qu'il va mourir, on va s'en débarrasser bien vite. "

Q. Monsieur Russell vous a-t-il dit ceci lui-même ?

R. Oui, lui-même.

Q. C'est avant qu'il se soit marié à madame Robitaille.

R. Oui.

Q. Est-ce que c'était un homme qui savait ce qu'il disait dans ce temps-là ?

R. Oui, mais je pense que les affaires que le notaire Larue a faites, les derniers paiements ont été faits après ça.

Le révérend M. Sexton confirme ces propos à la page 74 de son témoignage, il dit :

Q. About that time or prior thereto, do you remember his expressing in any way with reference to Miss Ellen Russell what his feelings towards her were ?

A. After she left his house ?

Q. After she left his house, what his feelings were towards her ? What he said to you ?

A. He very often said he had great love for her. That she had done a great deal for him, but at the same time he very often expressed that he was dissatisfied with her keeping company with a young man with whom he was not pleased.

Q. Will you give that young man's name ?

A. Mr. Gilchen.

Q. Do you remember about what time he said this to you ?

A. I think the first time was when he came to get a dispensation for his marriage. I think it is about that time for the first time. I cannot say for sure but to the best of my recollection.

Q. To the best of your knowledge, do you remember if he gave you any reason for his niece leaving his house because of the difficulty between them ?

A. I consider from what he told me that the reason he had for expelling her from his house was on account of her keeping company with this young man.

Q. When you saw Mr. Russell, as you did repeatedly during the autumn of eighteen hundred and seventy-eight

(1878) up to about the end of November, how did he appear to be as far as the mental faculties were concerned ? Elisabeth Russell et al. & Dame Julie Morin.

A. With regard to any transactions, any serious transactions he had to perform, I consider he enjoyed his mental faculties as well as any body else. On certain questions for instance, when speaking of his niece and this young man, he would get very excited and make use of very strange expressions, but with regard to any serious transactions, such as money matters and other affairs of that kind, he seemed to have very good use of his mental faculties.

Les faits sont confirmés par 3 ou 4 membres de la famille Lefrançois, amis d'Ellen Russell, qui s'était retirée chez eux à titre d'amie et alliée de la première femme de M. Russell.

Pierre Lefrançois dit : appendice p. 168.

R. Plus tard après ce que je viens de raconter, je crois que c'est le premier août mil huit cent soixante-dix-sept, si je me rappelle bien, je suis débarqué par les chars avec monsieur Russell, à Lévis, par le chemin de fer de l'Intercolonial, et j'ai laissé monsieur William Russell, à peu près vers neuf heures et demie ou neuf heures et trois quarts du soir, pour s'en aller chez lui. Il me disait qu'il s'en allait chez lui, nous nous somme laissés à la station et il s'est rendu chez lui, d'après ce qu'il ma dit.

(Objecté par l'Intervenant. Objection renvoyée par son Honneur le Juge en Chef.)

Il m'a dit qu'en arrivant chez lui, il est débarqué de la voiture qui le conduisait, il a pris son passe-partout dans sa poche et il a ouvert la porte de la maison, et il a trouvé dans sa maison, mademoiselle Russell avec monsieur Gilchen, en manche de chemise, pas d'habit sur lui.

Q. Etant sobre, vous en a-t-il parlé ?

R. Etant sobre il s'est plaint à moi que mademoiselle Russell n'agissait pas avec lui tel qu'elle aurait dû agir. Il m'a dit à moi, privément, confidentiellment, si je dois le dire, qu'il s'apercevait ou s'était aperçu que son butin disparaissait de la maison, certain nombre d'effets manquaient et elle gaspillait beaucoup de choses, et il avait appris par les voisins, et et il ne me les a pas nommés, que mademoiselle Russel faisait gogaille, comme on le dit vulgairement, dans la maison avec monsieur Gilchen. C'est ce que monsieur Russell a dit.

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Q. En quel état d'esprit était-il d'après ce que vous avez vu ?

R. Je l'ai vu tout ce temp-là et je jure positivement que je connais l'homme depuis cinquante ans et que, s'il était fou dans le temps, il l'a été tout le temps de sa vie à venir jusqu'au vingt ou vingt-deux décembre mil huit cent soixante-dix-huit, auquel je ne me suis pas aperçu, mais que c'est lui qui m'a dit à moi-même qu'il s'apercevait que sa mémoire lui faisait défaut. Jusqu'au vingt ou vingt-trois décembre, je ne me rappelle pas exactement, il m'a fait faire une transaction dans ce temps-là, et en me faisant faire cette transaction il me dit qu'il s'apercevait que sa mémoire lui faisait défaut ; jusqu'à cette époque je m'en étais jamais aperçu et je l'avais toujours connu.

Q. Avez-vous eu occasion de voir en quels rapports vivaient Russell et sa femme madame Robitaille ?

R. Monsieur Russell a dit devant moi et devant madame Robitaille, qu'elle faisait tout ce qu'elle pouvait et qu'elle était sur pied nuit et jour pour lui, et qu'elle lui prodiguait tous ses soins. Je ne me suis jamais aperçu qu'il ont eu un mot ensemble.

Q. Vous rappelez-vous si quelqu'un à part de vous l'avait solicité de donner cette somme-là ?

R. Je me rappelle que madame Robitaille devant moi (monsieur Russell ne voulait rien lui donner) je me rappelle que madame Robitaille a dit à monsieur Russell devant moi, qu'il devait lui donner quelque chose et que pour sa part elle était prête à lui donner deux cents piastres de l'argent qu'elle avait pour donner à mademoiselle Russell.

Alfred Lefrançois ajoute :

Q. Avez-vous eu occasion de converser avec mademoiselle Ellen Russell quelques fois ?

R. Oui.

Q. Avez vous eu aucune conversation avec elle au sujet d'un nommé Gilchen ?

R. Oui.

Q. Voulez-vous raconter ce qui s'est passé entre vous à ce propos ?

R. C'est à propos de la banqueroute de M. Gilchen, mademoiselle Ellen Russell elle même m'a appris combien M. Gilchen payait dans la piastre dans sa banqueroute, elle m'a

dit qu'il payait cinq cents dans la piastre. Elle avait l'air contente. Je lui ai demandé pour quelle raison. Elle m'a dit que monsieur Russell ne pouvait pas en perdre assez,qu'elle serait contente s'il pouvait tout perdre son argent, qu'elle n'en avait pas besoin.

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Q. N'a-t-elle rien dit d'autre chose au sujet de son oncle ?

R. Elle a dit qu'elle aimerait à lui voir trainer les chemins.

Georgianna Lefrançois, et Cédulie Lefrançois, confirmant cela par les aveux d'Ellen Russell.

" Elle a dit que c'était parceque la maison était fréquentée " par Gilchen que Mr. Russell l'avait envoyée de la maison " p. 192, app.

N'y en a-t-il pas assez-là pour justifier le Testateur Russell de changer ses dispositions d'esprit. Dans un débat de cette nature il y a naturellement quelquefois une chaleur qui gagne les témoins, mais les fait et les écrits qui ont precédé de six semaines l'exécution du Testament du 27 novembre 1878 sont certains. A moins de mettre de côté cette suite de transactions en présence de cinq notaires agissant séparément et plusieurs autres témoins, on ne peut en venir à une autre conclusion que de maintenir ce testament ; il a pour lui la présomption de vérité et de validité, qui ne peut-être détruite que par des preuves certaines et absolues.

Qui sait s'il n'est pas passé dans l'esprit de Russell une idée que, s'il laissait sa fortune à sa nièce Ellen, elle ferait controler et dissiper cette fortune par Thomas Gilchen. N'avait-il pas raison d'avoir cette crainte ? on ne peut scruter ses motifs.

Ce testament ne contient rien qui indique un manque d'intelligence et de volonté.

Il lègue $2000 aux pauvres de la local'té dans laquelle il a toujours vécu et où il a fait profiter sa fortune à bon intérêt. Est-ce un acte de folie ?

Il lègue (après avoir déjà donné $500 à $600 de main à main à sa nièce) le reste de sa fortune à Julie Morin, celle qui était alors et qu'il avait droit de considérer sa femme légitime. c'était son droit.

Quant à l'événement subséquent l'apparition du premier mari Robitaille,cela ne peut pas et ne doit pas influencer sur l'état d'esprit de Russell, qu'il faut prendre au jour qu'il a fait son testament et non après.

Je me crois obligé de suivre ce que je crois avoir été la

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rigoureuse et stricte interprétation de la loi dans le jugement qui a été rendu après mûr examen des faits et du droit par la Cour Inférieure, et je suis d'avis de confirmer ce jugement.

Ramsay J.—The late William Russell, a Pilot, who had amassed a considerable fortune for a man in his position of life, died interdicted on the 7th September, 1880. The Curator to the interdict was one Austin, a Notary. Lefrançois, one of the three Respondents, as Testamentary Executor, under a will of the said late William Russell, executed on the 27th November, 1878, sued the Curator to account. To this action one of the nieces of Russell, Elizabeth Russell, intervened in the quality of legatee under a previous will of her late uncle executed on the 8th October, 1878, and also in her quality of heir-at-law to her said uncle, and set up that her uncle was of unsound mind when he made the will of the 27th November, and that he so made it under the undue influence of Julie Morin, a woman who had been married to him, and was living with him as his wife, but she was really wife of a man called Robitaille ; (2) That the will was void in so far as regards the disposition to Madame Robitalle if he believed her to be his wife, and that it was void, as being contrary to good morals, if he knew she was not his wife ; (3) That the will was not made in conformity with the law.

The first of these grounds alone deserves serious consideration. Article 831 C. C. gives full power to every one of sound mind to alienate his property to any person capable of acquiring and possessing, with the only exception that the dispositions and conditions be not contrary to public order or good morals. This evidently does not refer to the bequest to a mistress or to a concubine, but to dispositions or conditons which depend on the doing of something or leaving something undone contrary to good morals. Again, if Russell believed Madame Robitaille to be his wife, the bequest would be good even if she was not, as there is no doubt as to the person to whom the bequest was made. Error as to the person is of no importance unless the individuality be the determining cause, Mackeldy Brs. Ed. p. 200. There are numerous passages in the Digest recognizing the principles involved in these rules. D. xxxviii, 5, 248, § 3 ; D. vi., 1, 5, § 4. In the

present case he gives his property to his wife, Julie Morin, and there can be no doubt therefore as to the person. He did not give his property because she was his wife.

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The technical objections to the will do not appear to have been pleaded.

We therefore come to the real question, the state of Russell's mind on the 27th November, 1878.

Cases of this sort always present considerable difficulty in appreciating the evidence, but I do not think there is much to be gained by elaborate commentaries on evidence consisting chiefly of opinions of persons more or less interested in the issue, or partisans of one party or the other.

Nothing is more easy than, in a case like this, to make a brilliant exposition of one side that seems to leave nothing to be said on the other side, except, perhaps it be to arrive at a totally unsound conclusion. All one has to do is to bring into strong relief some facts and to subordinate all the others in order to transform an eccentric old man into a raving maniac or the reverse. In this way I might easily insist upon the character of Russell as explanatory of his eccentricities, of his conduct of his own affairs during the time of his alleged insanity, that the Intervening Party who attacks the will claims under a will made on the 8th of October, 1878, six days after the execution of a deed which is relied on as the chief indication of Russell's folly, of his determined design to leave his money to his wife, when under no conceivable influence but that of his own will. If this requires to be done it has been done from different points of view with much more effect than I could hope to produce. It seems to me that we have to take the evidence as a whole, and before we can reverse the decision of the Court below we must be prepared to say that, on the 27 th November, Russell was insane. It is idle to confuse the question before us with the complex idea of age, ill-health, intemperance and liability to be influenced, for there is no evidence whatever that either Julie Morin, or anybody in her interest, exercised any influence over him whatever. We may presume that Julie Morin spoke to him about his will, but we do not know it. The only time he seems to have spoken to her about how his property was to be left, was before making his will of the 8th October, and then his niece was in the house, and probably might have been pre-

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sent. At any rate, Julie Morin either consented to the change, or her influence did not control the Testator. The evidence only discloses a fragment of the conversation between the deceased and Julie Morin, from which nothing conclusive one way or the other can be gathered.

The naked question is one of insanity, and this is a question open to endless speculation. With greater facility than any other question it drits into the unfathomable regions of metaphysics, which are beyond our domain.

We have no canon of sanity, we have a rule as to responsibility. Irresponsibility must be established by facts.

After hearing all that has been said one way or the other, I must say that I have no hesitation in expressing the opinion that the Appellant has failed to establish her pretension and that the will of the 27th November, 1878, should be maintained. To the careful judgment of Chief Justice Meredith, I have only to add that the evidence of Dr. Russell and of Miss Russell seems to me to stand alone in support of the pretensions of the Intervening Party, and Miss Russell's evidence appears to me to be totally inadmissable. She is directly interested in the issue, and if not nominally a party to the suit, she is its promoter.

Dr. Russell's evidence is much affected by his certificate. I do not desire to say anything unnecessarily disagreable to a gentleman occupying so highly a respectable a professional standing as Dr. Russell, but I must dissent from the opinion expressed by the Chef Justice that this certificate within the explanation given does not affect in the least the Doctor's testimony. The explanation amounts to this, that in the interest of the Testator at one time, he gave his assurance, on his professional responsibility, of a fact, which another interest arising, he declares to be untrue. It has been said Dr. Russell's certificate only declared him to be sane enough to receive money, not to bequeath it. This is a novel distinction; but really the effect of the receipt of the money was to ratify the donation by Russell. Dr. Russell's intentions may have been excellent, but I must necessarily set his testimony as to a matter of opinion, so contradicted, entirely aside.

Without the evidence of Miss Russell there is really nothing to support the pretensions of the Intervening Party but gossip.

The long and able dissent of the learned Chief Justice compels me to extend my remarks beyond the limits I intended, in order that it may not appear that the majority of the Court has overlooked any point in the case. It is to be observed that the ground taken by the Chief Justice is very different from that taken at the argument. Mr. Cook's contention was that Wm. Russell being insane on the 2nd of January, it must be presumed that the insanity began some time previous to that, and went back at all events to the 27th November, but not to the 8th October, for his client claims under a will of that date. It is impossible for her to pretend that she claims under a will made by a person she knew to be insane. But this doctrine of a persumed insanity prior to interdiction is totally untenable in law. If it were to be admitted, the first question would be as to how far back it extends. The doctrine of the law is that sanity is presumed until insanty is established, unless there be interdiction, and then the presumption is in favor of insanity ; but it is only by interdiction that the burden of proof passes from the party alleging insanity to the party denying it, and this must be as true dealing with an act done the day before the interdiction as of an act done a year before. Akin to this doctrine of the Plaintiff is the theory of progressive madness, mentioned in one of the medical books quoted by the Cheif Justice. As a medical view I dare say it is very correct, one readily conceives the idea that madness does not usually declare itself in an instant— it frequently, I dare say, begins with birth ; but Courts take no notice of possibilities of this sort.

The view of the case taken by the learned Chief Justice is that Russell was insane from the end of September, and this being established it is for those who support the will to show it was made in a lucid interval. I entirely agree with this proposition if the fact was proved, but I think it is not. In the first place it is not the pretension of Appellant, and there has been no effort to prove a lucid interval. It is also said the will itself is a proof of insanity, and much stress has been laid on the observation of the learned Cheif Justice in the Court below that the the will was cruel and *unreasonable.* Language is undoubtedly insufficient to convey ideas with perfect precision, but it is the only medium we have, and we must make the best of it. We therefore use words in many sense totally

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different from that in which the writers who have been quoted use the word *déraisonnable*. He obviously meant that the will was unreasonable in this, that it was not in accordance with those dictates of reason which proceed from the highest motives. The writers, on the other hand, mean by *déraisonnable*, what is insane. One of them says so in express terms. It would be insane for a Quebec pilot to leave his money to the Emperor of China, it is not *insane* for him to leave it to the woman he believed to be his wife, instead of to his niece, although in a sense it is cruel and unreasonable not to provide for a relative he had brought up in his house almost as his child. The only fact which indicates want of prudence and forethought on the part of Russell is his giving away his half-built house. But it is to be observed that he was very ill, that he had still to expend a great deal of money to finish it ; he had lost money which caused him much annoyance ; and, under these circumstances, it does not seem to me to be a conclusive proof of insanity that he sacrificed a possible gain for relief from anxiety and risk.

I don't think his offers of furniture and other things, or his declarations of poverty, amount to anything. Miserly people constantly express despair at losses which to others less sane would appear trivial ; till less do I consider it a sign of folly that he should have left $2,000 to be distributed in charity instead of leaving it to his poor relations.

It has also been said that the evidence of his insanity is negative, and therefore not as convincing as the evidence of his insanity. I understand that if A swears he saw B in the street, and C swears he did not see him, the evidence of A is not contradicted by that of C, and the fact is proved that B was in the street, but that is not parallel to the case in point. If I swear, that I did business with A, and he showed no sign of insanity, it may be called negative evidence, but it is not a negative pregnant. It is as though I should swear he appeared to me sane. I swear to the existence of reason, and in so swearing I swear as positively as he who swears to its absence. There is one piece of evidence which has been insisted on as shewing Russell's intelligence on one hand, and on the other as shewing his insanity. A country *Curé* of his acquaintance and four of his friends engaged in building a church came to see Russell, in order to borrow money for the com-

pletion of their work. Their property was already mortgaged quite up to its full value. They talked with Russell two hours,and they had to leave without being able to say, whether he had money to lend, or whether he would lend it if he had it. He referred them to his Notary. Here, says Appellant, is a complete proof that Russell's mind was entirely gone. I may say this was not the impression of the Curé and his friends, nor do I think it is the fair inference to draw. It is a well-known artifice of money lenders to affect to have no money in order to enhance its value. Those who have no personal experience of this method may have learned it from the comic writers. Again, I dare say Russell was a good Catholic, and probably he did not like to tell a friendly Curé point blank that his material security was not worth sixpence, and that he attached very little more to the moral one, which he was evidently expected to take in exchange. His Notary could save him from a seeming discourtesy, and he sent his visitors to be dealt with *en règle.*

Some allusion was made to the case of *Close & Dixon*. It was an action to set aside a will on the grounds of insanity of the testator, and there begins and ends the resemblance between that case and this one. What the party wishing to uphold the will had to prove was a lucid interval, that is, the burden of proof was reversed. In the *Close* & *Dixon* case the insanity and the malady which caused it were proved beyond a doubt, and the medical testimony further established, that in the condition the testator was in, an interval of lucidity sufficient to enable him to be able to dictate a will was next to an impossibility.

I am to confirm.

Cross, J. The controversy in this case involves the validity of a will made by the late William Russell, at Quebec, on the 27th November, 1878. It arises in maner following :

Russell had been interdicted for insanity by proceedings had before the Prothonotary of Quebec on the 4th January, 1879, and Henry C. Austin appointed Curator to his person and property. He died 7th September, 1880.

Pierre Lefrançois, Russell's brother-in-law and sole executor under the will impugned, brought a suit against Austin for

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an account of his administration and the delivery over of Russell's estate.

Austin pleaded that two parties had demanded the estate from him, each disputing the right of the other ; that he was willing to account and deliver it over to whomsoever the Court should decide it belonged.

Elizabeth Russell, claiming to be a special legatee, under a will made by Russell on the 8th October, 1878, intervened, and disputed the will of the 27th November, on the ground of unsoundness of Russell's mind on the day it bears date, and also on the ground that it had been procured by fraudulent machinations practiced upon Russell by the universal legatee named in it, to wit, Julie Morin, Mrs. Robitaille, who had married Russell, pretending that her former husband Robitaille was dead, while knowing that he was alive, and by the exercise on her part of undue influence over him.

Elizabeth Russell, afterwards by suit called in Julie Morin to be party to the contestation of the will of the 27th November, 1878, so that the judgment should be made common to all concerned.

Issue being joined the parties went to proof, and by the judgment of the Superior Court, given by the Hon. Chief Justice on the 2nd May, 1881, the contestation was overruled and the will sustained.

From this judgment Elizabeth Russell has appealed.

It cannot be said that the case is at all clear, or without difficulty, and the powerful reasoning of the learned Chief Justice of this Court, given in support of his dissent, shews how much it is susceptible of difference of opinion.

The question involved is, however, chiefly one of fact, and after having gone carefully over the case I feel little inclined to disturb the conclusion arrived at by the Hon. the Chief Justice of the Superior Court, evidently, after great pains taken by him, and considering his recognized ability, experience and industry in the analysis of evidence in such cases, and the better opportunity had by him than any of us can pretend to of appreciating the weight to be attached to the testimony of the several witnesses who have been examined; on the whole I would be satisfied to refer to the elaborate and discriminating remarks made by him as a justification of my judgment. If at all disposed to offer a word of criticism I

should venture to say that he has laid rather more stress than need have been done on the supposed injustice to Ellen Russell, of the will in dispute made in favor of Julie Morin; not intending by this remark to dispute that a provision by him in favor of his niece would have been desirable, but to advert to the fact that there were apparent causes operating calculated to estrange the consideration he otherwise might have exercised in favor of Ellen Russell.

In a controversy like the present friendly sympathy and partisanship frequently go far to pervert and discolor the views taken by witnesses, especially where opinion, as contradistinguished from fact, enters largely into the matter brought to bear for the purpose of influencing the case, and where the contest has in great part to be abandoned to the control of the uncertain influence of verbal testimony. Fixed facts, as distinguishable from mere opinion, must always be of great weight in such cases; the motives and disposition to partisanship of the witnesses are also of considerable moment.

Ellen Russell had an evident interest in raising the controversy in the name of her sister, who had but a comparatively small stake in the matter, to allow Ellen so largely interested to testify freely in her own favor. The proof corresponds with this, and shews that she is in fact the real moving party.

Much of the testimony adduced in support of the contestation appears to me to be of a loose, vague and partisan character; and many of the coarse expressions attributed to Russell, the Testator, are such as men of his habits of life and surroundings, particularly when addicted to drink as he was, frequently use without attaching thereto any great significance. There is, notwithstanding, much in the proof and the nature of the case to engage serious attention.

I think no particular reliance has been placed on the grounds of fraud and undue influence; for my own part I think them unsupported by proof, and that the difficulty is confined to the question of the mental capacity of Russell on the 27th November, 1878, when he made the will in question.

I should perhaps notice the point submitted, that Julie Morin had deceived Russell, by pretending when she married him that she was a single woman, when she was in fact the wife of Robitaille; the case is not one of error as to the person, the evidence shews that Robitaille who had been absent many

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years was really believed to be dead. The marriage with Russell was in good faith by both parties, who honestly believed themselves to be lawful husband and wife, a state of facts which, according to our law, would give civil effects to the marriage. She had no reason to infer that her relations with Russell were immoral, or that her position was other than that of a legitimate wife, in which light Russell had looked upon and treated her ; nor was this state of things altered until it became of importance to affect her standing, when Robitaille was brought back to this country, and Julie Morin was subjected to a charge of bigamy, from which she was acquitted,— this occurred when Russell was under sentence of interdiction.

I shall now advert to some of the leading features of the case as brought out in evidence, in great part from the evidence of Ellen Russell herself, whose testimony can scarcely fail to be colored and influenced by the sense of injury and disappointment under which she labors.

Divesting the evidence as much as possible of the coloring by which it is enveloped, I shall refer to the following marked features :

In the year 1852, on the death of James Russell, brother of the Testator and father of Ellen and Elizabeth, William Russell, then a ship's Pilot, not occupying a very high position either socially or financially, took into his establishment and afforded protection and gave a home to his niece Ellen, then an orphan ; an arrangement no doubt at the time highly advantageous to her, and which she most probably would have continued to profit by up to and after Russell's death, had she not voluntarily chosen to pursue a course uncongenial to his feelings.

Russell was thrice married, the second time to Ellen Lefrançois, a sister of the Respondent, who died in 1873. In 1877 he manifested a preference for Julie Morin, the reputed widow of Edouard Robitaille ; he had long been acquainted with her, she lived in the same quarter of the city as he did, and had supported herself by her own exertions from early life, having had the misfortune to be abandoned by a worthless husband, who had left the country soon after their marriage, and had not been heard from, save through a rumor

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of his reported death, but who turned up in 1879, to serve in the prosecution for bigamy.

Russell's growing affection for Julie Morin was distasteful to his niece Ellen, on which account, and probably by her favoring one Gilchen, against whom Russell conceived a grudge, an antagonism began to manifest itself between uncle and niece. On several occasions he intimated to her his intention of bringing Julie Morin into the house, against which she always remonstrated. Fixed as he was in his purpose, and being of irrascible disposition and intemperate habits, he adopted measures to attain his object. As Ellen Russell herself relates the occurrence: In August, 1877, coming home very much intoxicated and very violent he said to her, "you must leave the house; I am going to bring Mrs. Robitaille in; I will be my own master." She accordingly left the house and stayed away some days with her sister and with Lefrançois, but being sent for by Russell, as she says, who had in the meantime introduced Mrs. Robitaille, Julie Morin, she returned, being apparently reconciled to the then state of things, and remained with her uncle for a month, when, as she says, she left, being scandalized with the conduct of her uncle and Mrs. Robitaille, and owing to immoral relations between them. She told her uncle that she could not live in the house; that she was advised by her spiritual adviser to leave it. He replied that he was his own master, he could do as he liked; that he wanted Mrs. Robitaille there. I think there is no other evidence to give any serious support to this accusation of immoral relations between Russell and Mrs. Robitaille. They were married in November following.

From the time she left her uncle's house, Ellen Russell's influence with him continued to decrease and that of Julie Morin to increase, particularly after their marriage, exactly what might have been expected.

In abandoning the house Ellen Russell claims to have done a meritorious act, and from her own point of view, as she represents it, this may be freely conceded, but while claiming the full merit as if of a laudable act, she must necessarily submit to the self-sacrifice such an act imposed. She could scarcely hope to retain the same place in her uncle's affections, while acting contrary to his wishes, and avowedly disapproving of his conduct; she had great reason to infer that

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such a course would jeopardize such benevolent intentions as her uncle might previously have entertained towards her. There was then no question of the soundness of his mind; he had a right to mould his affections as he would, and even to act capriciously without any one having title to call his will in question. Had Ellen Russell chosen to be reconciled, the marriage afforded her an excellent opportunity of overcoming her scruples on the score of morality. On the other hand, Julie Morin stood in the relation to Russell of a legitimate wife, and the proof goes to show that she honestly and faithfully comported herself towards him as such. She was therefore in a position to exercise the reasonable influence of a legitimate wife, just as much as Ellen Russell had ever been that of a relation and inmate of Russell's house. The niece and the wife remained on bad terms with each other. Russell found himself, by a kind of moral necessity, forced to chose between them—between a niece who had abandoned and reproached him, and a wife devoted in her attentions. Was it unnatural that he should have preferred the latter, and disregarded what might have been considered the claims of the former? Between the niece and the wife, was it surprising that he should have preferred the latter? He chose to gratify his wife and to disappoint his niece, a contingency most likely to occur under the circumstances.

But it will be said that this does not touch the question of the capacity of Russell to make a will on the 27th November, 1878. It so far touches the question as to show that the act was consistent with a sane and rational mind, and that admissable and sufficient reasons existed to influence a rational disposition of his property in the direction given to it by the will in question.

The influences I have referred to exhibit themselves in the several wills made by Russell. By that of the 4th October, 1878, he disposed of a large part of his fortune, $4,000 and all his household furniture and effects to his beloved wife, Julie Morin, $2,000 to Ellen Russell, and $1,000 to the Rev. Mr. Sexton for charitable purposes, and the rest to his brothers, nephews and nieces in equal shares. No one will pretend that this was an unreasonable will, and the contestation in no respect questions Russell's sanity at this time, yet it is obvious that Ellen Russell's place in her uncle's affections

had by that time very much diminished. This will was drawn up by Mr. Austin, the Notary, who did the greater part of Russell's business at that time.

He made an other will on the 8th of October, 1878, the history of, and reason for which, are very well demonstrated in the evidence. It is evident that Ellen Russell had heard of what her uncle had done so much to her prejudice, and immediately set about repairing the mischief. She says that Russell sent for her; It appears that she was apprehensive of being excluded by Julie Morin, and called upon the Rev. Mr Sexton, desiring him to be present at their interview. By arrangement between them he was to enter first, so as to ensure her admission. The interview was at all events obtained; she explains that, after an expression of contrition on Russell's part and begging her pardon for his ill-treatment of her, he gave her a dollar, and asked her to take a waggon and go for Mr. Austin, the Notary, to make a will. She went for Mr. Austin, who made his appearance in due course, as did also his assistant, Mr. Beaumont. The will was all ready prepared, and was read over by Mr. Austin and declared to be ready for signature. Russell said he must first ask his wife's permission to sign it; he went into the kitchen, and spoke to Mrs. Robitaille; he returned and said, " she will not permit me to sign that will." After considerable expostulation and a second reference to his wife, who still refused consent, and an earnest appeal from Ellen Russell in the following words: " Well, Uncle, will you not do something for me, you know I am not strong and cannot work," he then took the pen and said, " I do not care, I will sign it. " " My uncle took the pen and signed the will in presence of Mr. Beaumont ; the priest had left the house while I went for Mr. Austin. The Notary. Mr. Austin, in his evidence describes the occurrence as follows : " As far as I recollect, when I went to execute the will with Mr. de Beaumont, he (Russell) hesitated to sign, stating that his wife would not let him sign it. His niece began to cry ; there was a little fuss. He said to me, I will sign the will coûte que coûte, or terms exactly similar to these, in Mr. de Beaumont's presence ? " Being asked, " who gave you the instructions for the will of the 8th October, 1878, " he answers, " I suppose the instructions must have come from him ; I cannot recollect particularly where they came from,

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but I could not have done anything if they had not come from him."

Question by the Court. Where did you get instructions for the will?

Answer.—I cannot just say at the moment where they came from. I must have gone to his house to get the instructions, or they must have been sent to my office. I do not recollect.

Question.—You cannot remember whether you went to his house to get the instructions or whether he came to you?

Answer.—I cannot say just now.

It is evident that Russell did not wish to make this will, and signed it with marked reluctance, ceding to the importunities of his niece; but it is undeniable that he fully comprehended the situation, and that he was undoing what he had deliberately done four days before. It is extremely unlikely from the circumstances that he had anything to do with the preparation of this will, although he evidently knew its purport and effect; and it is likely that he remained for some time under the impression made upon him by his niece, with the idea floating in his mind that he might still change it—an idea that might not have been altogether absent even when he attached his signature to the document. It is probable that for a time he remained under the impression that the will so made favorable to his niece would remain in force. It appears that on the same occasion he gave his niece a sum of money, she says $500, others mention it as $600. The termination of this interview was not so cordial as its commencement, and if he did yield to the solicitations of his niece, what occurred was not altogether calculated to revive his decaying friendship for her. It appears that he afterwards sent her word that she should be careful in the employment of the money he had given her as she need not expect anything more from him, also that he did not want to see her. He waited for over six weeks, he had time to reflect, his health was bad, he was suffering great misery from a painful and irritating skin disease; he had the care and attention of his wife, and was apparently neglected by his niece. About the 23rd November he called at the office of Mr. Charles Henry Andrews, Notary, and not finding him in, left word that he wished to see him

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in order to make his will. Mr. Andrews went to his house on the morning of the next day, the 24th, and received from him his instructions to make a will, leaving, as Mr. Andrews relates, certain legacies, four or five hundred dollars he thinks, to three of his nephews and one niece, and the remainder to his wife. Mr. Andrews inquired if he would call on him at his house next day to execute the will; he replied no, that he would call at Mr. Andrew's office. No one was present at the time save themselves two. On the following day he went to Mr. Andrew's office and told him he had changed his mind, that the parties to whom he had left these legacies had no gratitude to him, that he had changed his will; he then gave Mr. Andrews instructions according to the will now in dispute, which he prepared accordingly. Russell came again to his office the next day, and the will being then ready Mr. Andrews read it over to him, in the presence of Mr. Glackmeyer, the second Notary and Russell signed it in their presence. After it was signed, Russell remarked that he hoped the will was in proper form, that there would be no fault found in it, because he was sure that in case of anything happening to him, of his death, his own relations would contest the will. Mr. Andrews, was well acquainted with Russell, had done business with him before, but had not frequently acted as his Notary ; he did not know, and had never to his knowledge seen his wife ; he had no communication with any one about the will in question save as related.

On the day the will was executed Russell gave Mr. Andrews a certificate from the Rev. Mr. Sexton, and desired him to keep it, being a certificate dated the 26th November, signed by the Rev. M. Sexton, stating that he had on the 25th administered the Sacraments to Russell, and that he was in a perfectly fit state to receive them. In speaking of his mental capacity he says : " I considered that he was in perfect health, and knew perfectly well what he was doing. " At another place he says : " He had in his mind that whatever will he made in favor of his wife, it would he contested by his relations. "

No more deliberate purpose could be shewn by any testator to make a valid will than was done by Russell on the occasion in question, and he evidently had a perfect appreciation

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of the effect of the act he was performing. He never forgot this will, he spoke of it several times afterwards, and in a conversation with Dr. H. Russell as late as the 17th August, 1880, when, as the Dr. says, his mind was clear and perfectly lucid, he mentioned the fact of having made this will in favor of Julie Morin. He obviously then fully comprehended the effect of it. It has been argued that the very fact of his producing a certificate from the Rev. Mr. Sexton was itself a proof of insanity, and must have been suggested by interested parties. I think this a delusion. Testators are frequently very much exercised over the possibility of their wills being disputed, and adopt special precautions to provent it. How often do we see stringent provisions in wills forbidding relatives to contest them under pain of complete exclusion. I happen to know of a precaution similar to that adopted by Russell being taken by the founder of the Fraser Institute at Montreal, who the day he made his will called in his medical adviser and asked him to take note of the fact that he was perfectly sane, because he apprehended that his relations would contest his will.

It may be here noted that Mr. Andrews, when asked if he did not apply to Dr. Russell for a certificate of Russell's insanity for the purpose of the interdiction, says that he did, and that on the first occasion Dr. Russell refused to give it without visiting Russell previously, stating that he could not give it until he was satisfied that Russell was of unsound mind.

In fact, Russell's aberration of mind does not seem to have been from any sudden violent derangement of his mental faculties but rather from a gradual weakening of their strength ; this is shewn as late as when interrogatories were submitted to him for the purpose of having him relieved from the interdiction, and his case may not at any time have been so very bad as it has been represented. He is shewn to have been from time to time subject to fits of mental depression more or less marked ; he is shewn also to have transacted important business, and to have been quite capable of doing so. Speaking of the autumn and up to the end of November, 1878, the Revd. Mr. Sexton says with regard to any serious transactions, such as money matters and other affairs of that kind, he seemed to have very good use of his mental faculties.

Even the Contestants contend that in September, 1879, and from that time up to his death, Russell had intervals of lucidity when his mind was clear.

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Russell may not on the 27th of November, 1878, have been possessed of so full an amount of mental vigor as he ever had, and yet have been quite competent to make a will. Quoting from an eminent author, himself adopting the language of a distinguished Judge speaking of the capacity of a testator necessary to a valid will, he says: " He must in the language of the law have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged; a recollection of the property he means to dispose of; of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such mind and memory as will enable him to understand the elements of which it is composed, the disposition of his property in its simplest forms. In diciding upon the capacity of the testator, it is soundness of the mind and not the particular state of his bodily health that is to be attended to. The latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of. He must have memory. A man in whom this faculty is wholly extinguished cannot be said to possess an understanding to any degree whatever or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons or the families of those with whom he had been intimately acquainted; he may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will...... The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the

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manner of distributing it, and the objects of his bounty? To sum up the whole in its most simple and intelligent form, were his mind and memory sufficiently good to enable him to know and understand the business in which he was engaged at the time when he executed his will? In *Kinne* vs. *Kinne*, 9 Conn. R. 102, it was held not to be essential to the legal capacity of a testator to make a will that he should be capable of managing business generally. It is enough if in the making of his will, and at the time of making it, he understands, what he is doing."

The same author adds: "Mere weakness of understanding is no objection to a man's disposing of his property by will, for courts cannot measure the size of people's understandings and capacities, nor examine into the wisdom and prudence of men in disposing of their states...... It is not necessary that a man should be possessed of a mind naturally strong, or that the powers of his mind or memory should be wholly unimpaired, to enable him to make a valid will. Such a standard of testamentary capacity would produce infinite mischief to society."

Russell was at all events sufficiently insane on the 4th of January, 1879, to be interdicted, and that on the demand of Julie Morin herself, a fact therefore indisputable by her. Before our Civil Code became law, the fact of interdiction would not of itself have prevented him from making a valid will, if it were proved that his mind was sufficiently sound by reason of a lucid interval or otherwise at the time it was made. We are bound, however, from the fact of interdiction alone to assume that Russell was insane on the 4th of January, 1879, and that he must have been so for at least some days previously. The question is how far back this insanity should be carried. This depends upon the appreciation of the proof. Ellen Russell would consent to carry it back beyond the making of the will of the 27th November, but not so far as to involve the will of the 8th of October. If Dr. Russell's evidence were taken literally it would involve not only that will, but the will made in favor of Julie Morin on the 4th of October. I can appreciate Dr. Russell's theory from his point of view, it is one in vogue in earlier times, and still maintained by medical men of considerable eminence, that a person

insane on one subject cannot be depended on for anything, but should be considered of unsound mind generally. I think the Courts have found it an unsafe theory to adopt. Substantially the same idea was much pressed upon the consideration of the Court of Queen's Bench recently at Montreal in the case of *Queen* vs. *Bulmer* tried for shooting with intent of murder, but was entirely repudiated by the learned Judge who presided. It was there, however, as in the Guiteau case, urged to establish non-responsibility for crime ; which is perhaps a stronger case than incapacity for business.

The rule may be different in England, but according to our laws it is incumbent on whoever alleges insanity to impugn a will to prove it. " L'homme dans son état normal jouit de la plénitude de la raison : il n'en est privé que par un accident qui fait exception ; il doit donc toujours être supposé capable. En général c'est donc celui qui argumentera de l'insanité d'esprit qui devra l'établir." Michaux, Traité des Testaments, p. 13, Nos. 54 and 55, quoting from Marcadé :

C'est le demandeur en nullité qui doit fournir la preuve de l'insanité d'esprit parce qu'il affirme un fait contraire au principe supposant tout homme pourvu d'intelligence. The same citing from several authors :

Il faut que le demandeur prouve l'insanité d'esprit au moment même de la rédaction du testament. The same, No. 72, quoting from Demolombe, vol. 18, No. 361 :

Lors donc que les héritiers agissent en nullité ils doivent prouver qu'il n'avait pas au moment de l'acte la santé d'esprit qui est requise pour la manifestation de la volonté. Il ne s'agit pas de savoir quel est le genre de folie, ce qui est une question de médecine ; il s'agit de décider si au moment ou l'acte a été passé le disposant jouissait de sa raison ce qui est une question de fait que le Juge décidera d'après les témoignages de ceux qui ont été en rapport avec le malade. 11 Laurent, p. 159, No. 115.

No attempt whatever has been made to prove that Russell was insane or committed any acts of folly whatever, at or about the 27th November, 1878, while the Respondents distinctly proved by those who saw and conversed with him that he was perfectly sane on that and serveral previous days.

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Without further consideration this should conclusively determine the case in favor of the Respondents.

To sustain her case the Appelant was bound to prove insanity on that date, and has wholly failed to do so.

The proof of sanity was not incumbent on the Respondents until a presumption to the contrary had been raised against them, yet they have adduced precise proof of sanity on that and previous days, besides which I hold it to be affirmatively proved, that in the months of October and November, 1878, up to and including the 27th of November, when the will impugned was executed, Russell was in a state of mind fit to make a valid will. I will not attempt a detailed analysis of the evidence—a work so ably performed by the learned Chief Justice of the Superior Court— but will content myself with declaring my full acquiescence in the view he has taken of it, remarking, however, that during the months of October and November, 1878, Russell transacted a considerable amount of important business, including the execution of two powers of attorney,one to his wife,which he afterwards revoked; another to his brother-in-law, Pierre Lefrançois, on the 12th november; a sale of shares of Bank Stock on the 6th November; the withdrawal of money from the Sheriff's office, on the 8th November. Negotiations with the Syndics of St. David de l'Aube, and refusing an investment offered by them on the 19th November; the perfect intelligence with which he discussed with the Notary and with his niece the subject of the will of the 8th October; his intelligent and altogether independent action in regard to the instructions aud execution of the will of the 27th November; these, with the certificate of capacity for business given by Dr. Russell on the 11th November, 1878, and the Revd. Mr. Sexton's certificate of his fitness to receive the Sacraments on the 26th of the same month; the numerous and respectable witnesses that testify to his sanity, including also the family of Lefrançois, who had no visible reason for befriending Julie Morin, convince me that the will of the 27th November is not the fruit of a diseased brain, but is a deliberate act, directed by intelligence, in order to carry into effect a seriously devised and fixed purpose, one which, whether wise or not, is sacred as a right which the law gives to the testator, and the Court has no

right to substitute anything else in its place or to defeat the purpose the testator had in view.

It is quite true that there are some equivocal acts proved on the part of Russell, some extraordinary conduct; but, making allowance for exaggeration, there is really nothing serious to shew an impaired capacity. The transaction with St. Michel is the most noteworthy; but when we take into account Russell's wretched state of health at the time, the bodily misery he was suffering, and the inconvenience of his being annoyed by financial arrangements, as well as the discouraging prospects of the adventure, and the understanding St. Michel says existed that when he had finished the construction of the house Russell had deeded to him, if Russell wished he could get it back again by reimbursing St. Michel's outlay; and the fact that St. Michel only made a gain of $100 out of the transaction, less room is left for surprise; and it may be presumed that if Russell were alive he could give very sufficient reasons for disembarrassing himself of this property in the manner he did. But suppose, for the sake of argument, that there were isolated acts of extravagance perpetrated by Russell during the months of October and November, and of so precise a nature as to time as to apply to the 27th November, still these would be insufficient to affect the will, unless its dispositions were affected by the folly.

Considerable progress has been made in science and the spirit of legislation on this subject since Daguesseau's remarkable declaration in 1696 in the celebrated case of the *Prince de Conty* and the *Duchesse de Nemours*, to the effect that wills were odious, being an exception to the common law of succession, and should be restrained within the narrowest limits, and not upheld unless conforming strictly to the conditions on which the law permitted them.

As a contrast I cannot do better than to quote from a recent English case cited, by the Respondents, viz., that of *Banks* vs. *Goodfellow*, Law Reports, Q. B., vol. 5, p. 549, where it was held that partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will.

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At a trial which had taken place before Brett, Justice, involving the validity of a will in favor of the testator's niece, it appeared that the testator made the will in 1863; he had been confined as a lunatic for some months in 1841, and he remained subject to delusions that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present; and these delusions were shown to have existed between 1841 and the date of the will, and also between that date and his death, in 1865. As to the testator's general capacity to manage his affairs, etc., the evidence was contradictory; but it was admitted that at times he was incapable of making a will. The Jury were directed to consider whether at the time of making the will the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusion, as would enable him to have a will of his own in the disposition of his property, and act upon it; and they were further directed that the mere fact of the testator's being able to recollect things, or to converse rationally on some subjects, or to manage some business would not be sufficient to show he was sane. While, on the other hand, slowness, feebleness and eccentricities would not be sufficient to show that he was insane, and that the whole burden of showing that the testatar was fit at the time was on the party claiming under the will.

Held that the direction was practically right, for that it was immaterial whether the delusions remained latent or not at the time, if the testator was otherwise competent to make a will, as neither of the delusions—the dead man being in no way connected with the testator—had, or could have had, any influence upon him in disposing of his property.

A verdict was given in favor of the will, and a Rule had been obtained for a new trial on the ground of misdirection, and that the verdict was against the weigth of evidence.

It was heard before Chief Justice Cockburn and Justices Blackburn, Mellor and Hannen.

I will make some citations from the remarks of Chief Justice Cockburn on the rendering of the judgment, discharging the rule and sustaining the verdict.

He cites with approval from Kent's Commentaries as follows : " It is one of the painful consequences of extreme old age that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due to his infirmities. For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property.

But if the mind, though possessing sufficient power undisturbed by frenzy or delusion to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is the result, ought we in such case to deny to the testator the capacity to dispose of his property by will ?

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects ; shall understand the extent of the property of which he is disposing ; shall be able to comprehend and appreciate the claims to which he ought to give effect ; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties ; that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made.

If it be conceded, as we think it must be, that the only legitimate rational ground for denying testamentary capacity persons of unsound mind, is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so cir-

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cumstanced in a less advantageous position than others with regard to this right............

In these cases it is admitted on all hands that although the mental power may he reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. ....His capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as for instance to make contracts for the purchase or sale of property.

To sum up the whole in the most simple and intelligent form, were his mind and memory sufficiently sound to enable him to hnow and to understand the business in which he was engaged at the time he executed the will.

But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld.

But then, for the reasons we have given in the course of this judgment, we are of opinion that a Jury should be told in such a case, that the existence of a delusion compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it. "

The rule for a new trial was consequently discharged and the will sustained.

The same doctrine was held in the case of *Smee* vs. *Smee*, 18 Weekly Reporter, p. 703, decided in December, 1880 ; in *Jenkin* vs. *Morris*, L. R. Chancery Division, vol. 14, p. 674 ; and several other cases.

In the present case all the requisites to make a valid will were possessed by Russell on the 27th November, 1878 ; he hnew that he was disposing of his property, and did so in a fair and retional manner ; not only was he fully alive to the nature of the claims of his blood relations, but it is in proof that he considered these claims and, after reflection, rejected them.

The most approved French authorities are in accord with

the view that partial insanity, not affecting the disposition, is not a ground of nullity. I quote from Demolombe, t. 18, 339, being the 1st vol. of his Traité des Donations, No. 339 : Cette thèse de l'indivisibilité de la raison humaine compte aussi dans notre droit moderne des partisans très convaincus ; c'est ainsi que M. Troplong l'enseigne en ajoutant que la doctrine contraire n'est pas soutenable. La raison est une, dit l'éminent auteur, elle n'est pas susceptible de division.

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Nous ne voudrions pas pourtant nous associer à une conclusion aussi radicale ; et nous revendiquons, au contraire, dans cette hypothèse elle-même, le pouvoir d'appréciation discrétionnaire, qui doit appartenir aux magistrats pour décider, en fait, au point de vue légal et judiciaire, de la capacité de disposer.

Il arrivera sans doute, le plus souvent, que la monomanie aura exercé ses ravages dans l'intelligence toute entière ; c'est ce que nous ne demandons pas mieux que de reconnaître ; mais nous ne concèdons pas qu'il soit impossible qu'une folie partielle n'affecte essentiellement que l'un des côtés de l'intelligence sans anéantir l'intelligence elle-même et la volonté. Et si, par exemple, un homme avait contracté, dans l'étude opiniâtre d'un problème, des sciences mathématiques, physiques ou morales, une excitation maladive qui aurait fait de lui un monomaniaque, est-ce donc que cet homme devrait-être déclaré absolument incapable de disposer lors même que dans toutes les relations de la vie civile et de la famille il aurait conservé l'intégrité de son jugement ;

C'est qu'en effet la folie partielle que l'on distingue partout de la folie totale (distinction, qui serait vaine dans le système contraire), c'est, disons-nous, que cette folie partielle pourrait n'être elle-même qu'une folie avec des intervalles lucides plus longs seulement et plus considérables que ceux que certaines intermittences peuvent apporter à la folie totale..............ne serait-il pas plus juridique et plus sage de dire que cette question devra être résolue en fait d'après les circonstances, eu égard à l'objet, au caractère, à l'étendue enfin et à l'intensité plus ou moins grande de la monomanie du disposant ?

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à exercé son influence sur la disposition elle-même qu'il a faite, si elle l'a tourmenté et troublé dans l'exercice même de sa faculté de disposer.

S'il en est ainsi, si la disposition en porte, pour ainsi dire l'empreinte, et surtout si elle a été déterminée par elle, il sera certain qu'elle n'est que l'œuvre de la partie malade de son intelligence. L'arrêt précité de la cour de Bordeaux en fournit un exemple notable, et la cour a justement insisté sur cette circonstance.

Mais on devra être, au contraire, porté à penser que la disposition émane de la partie saine de l'intelligence, si elle est tout-à-fait étrangère à l'objet de sa monomanie ; comme s'il a récompensé les services d'un vieux domestique ou assuré des moyens convenables d'existence à son conjoint survivant pour lequel il n'avait point assez fait par son contrat de mariage.

Again it is a question of appreciation of fact wholly in the discretion of the primary tribunal.

Une règle est impossible à établir sur cette question toute de fait, et qui repose sur des bases changeant évidemment avec chaque sujet ; c'est pourquoi la solution en est abandonnée complètement au pouvoir discrétionnaire du Juge. Michaux, des Testaments, p. 15, No. 76, citing Cass, 5 août 1856, 9 avril 1862.

Jugé, entr'autres, que l'arrêt décidant, en fait, qu'un individu s'étant trouvé avant et depuis la confection de son testament en état de démence, joussait au moment où il a fait cet acte de toutes ses facultés intellectuelles, échappe à la censure de la Cour de Cassation. (Cass., 26 Juill, 1842, Michaux, p. 15, No. 77.)

Que l'arrêt qui annulle un testament en décidant, en fait, que le testateur n'était pas sain d'esprit et que ce testament n'était pas le fruit d'une volonté libre, ne donne point non plus ouverture à cassation (Cass., 19 janvier 1837). Michaux. p. 15, No. 78.

I shall conclude by a citation from 11 Laurent, p. 149, No. 115 : Il ne s'agit pas de savoir quel est le genre de folie, ce qui est une question de médecine ; il s'agit de décider si au moment où l'acte a été passé, le disposant jouissait de sa raison, ce qui est une question de fait que le juge décidera d'après

les témoignages de ceux qui ont été en rapport avec le malade. Sans doute, si des médecins l'ont traité, leur témoignage sera d'une grande autorité ; mais c'est moins un avis qu'on leur demande qu'une déposition sur les faits dont ils ont été témoins. Les médecins ont parfois des préjugés de théorie, de système, et ils prétendent imposer leurs opinions au juge. Troplong a raison de protester contre ces prétentions : ce n'est pas le médecin qui juge, c'est le magistrat. Par contre, les médecins auraient quelque droit de se plaindre si les jurisconsultes, au lieu d'écouter les gens de l'art, se mettaient à construire des théories médico-légales. C'est ce que Troplong a fait en écrivant une dissertation sur la monomanie, qui, d'après lui, enlève toujours au malade la clarté d'intelligence que l'article 901 exige pour disposer de ses biens à titre gratuit. Les tribunaux, plus sages que les théoriciens, se sont bien gardés d'adopter une opinion absolue : ils maintiennent ou annulent les testaments faits par des monomanes selon que le testateur était ou non sain d'esprit au moment où il a testé.

La Cour d'Angers a rendu sur cette question un arrêt très bien motivé. Que veut l'article 901 ? Que le testateur soit sain d'esprit au moment où il dispose de ses biens. Si la démence partielle que l'on appelle monomanie, à déterminé l'acte, évidemment il faudra dire que le testateur n'était pas sain d'esprit, mais si la monomanie n'a exercé aucune influence sur l'esprit du testateur, on ne peut pas dire qu'il était aliéné en testant, puisqu'il était sain d'esprit en ce qui concerne l'acte qu'il a fait. Dans l'espèce, la monomanie du défunt consistait dans l'idée que ses parents, aidés des médecins, voulaient l'empoisonner. Est-ce cette funeste disposition d'esprit qui lui inspira ses dispositions testamentaires ? Loin de là, il n'y avait dans son testament aucune trace de ces craintes maladives, aucune marque de la haine qu'il aurait conçue contre sa famille ; il y manifeste,au contraire, les bonnes intentionsqu'il a pour ses parents, en leur faisant des legs. Sur le pourvoi il intervint un arrêt de rejet où on lit, qu'il appartient exclusivement aux juges du fait d'apprécier si le donateur ou le testateur lorsqu'il a disposé, jouissait de la plénitude de ses facultés intellectuelles et était capable d'avoir et d'exprimer une volonté libre, raisonnable et indépendante, puisque seuls ils sont saisis des faits et des circonstances d'où l'on peut faire résulter l'altération totale ou partielle de l'esprit du disposant.

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The primary tribunal has determined that Russell, on the 27th of November, 1878, had the necessary capacity to make a valid will, that in the exercise of his functions, he, of right, made the will impugned. I see no room for the interference of a Court of Appellate jurisdiction in this case, but if it were the duty of such Court to weigh and appreciate the evidence, as a Court primarily seized of the controversy, I would, as a member of the Court, appreciate it in the same sense as the Chief Justice of the Superior Court has done. I am, therefore, in favor of sustaining the judgment of the Court below.

Honorable Mr. Justice Baby, concurred in the above judgment.

W. & A. H. Cook, for Appellant.
Andrews, *Caron & Andrews*, for Respondents.

MONTREAL, MARCH 21, 1882.

Corum MONK, RAMSAY, CROSS, BABY, Judges.

No. 54.

JAMES LORD & AL.

Defendants in the Court below

APPELLANTS.

&

JOHN ELLIOT & AL.

Plaintiffs in the Court below

RESPONDENTS.

Action by Respondents, owners of the steamship "Gresham" against the Appellants, Charterers of that vessel, claiming damages for seventeen days detention of their ship at the port of Syndney. In charter party, the Appelants had undertaken to give prompt despatch in loading and unloading, no stipulation being made for any limited number of days.

Held, that by their contract Appellants were only bound to use diligence in procuring cargo for the steamer Gresham, and there being no evidence of negligence on their part Respondents could claim no damages by way of demurrage.

CROSS J. (*dissenting*). This action was intituted by the owners of the steamship "Gresham" against Messrs Lord, Magor & Munn, Charterers of that vessel, claiming from them £850 Stg, for seventeen days detention of their ship at the Port of Sydney, Cape Breton, from the 19th July to the 5th of August, 1873, waiting for a cargo of coal promised by said Charterers.

Various points of minor importance were raised for the defence, but the principal point and the only one I deem it necessary to notice, was the plea of the Charterers that they gave the vessel despatch, and loaded her in turn according to the custom and rules of the Port.

The Court of original jurisdiction at Montreal on the 21st May, 1880, gave the owners of the ship judgment against the Charterers for £850 Stg., being for seventeen days detention at the rate of £50 Stg. per diem.

The correctness of this judgment is now brought in question by the present appeal.

The Charter Party was produced by the owners, executed at Montreal on the 12th June, 1872. It provides that the vessel which was then at Liverpool should proceed to Sydney, Cape Breton, and there load from the Factors of the Charterers a full and complete cargo of coal, taking her turn with other

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steamers and taking precedence of sailing vessels, and to receive prompt despatch ; carrying capacity about 1800 tons.

The owners, Plaintiffs in the cause, examined the Captain and First Officer of the ship, who testified to the effect, that the " Gresham " arrived at the Port of Sydney early in the morning of the 19th July. At nine o'clock the same morning Bulkeley, the Captain, notified Archibald & Co., the agents of the Charterers there, of the arrival and of the readiness of the ship to receive and load her cargo, to which Archibald & Co., on the 22nd, replied that they had wired to Montreal and would let the Captain know as soon as possible. The Captain also on the same day, that is on the 19th, telegraphed a like notice to Sidey the ship's agent at Montreal, to urge diligence on the Charterers, and no less than thirteen telegrams passed between him and Sidey, beginning 19th July and ending 5th August, containing emphatic complaints by the Captain on the subject of the delay, and representations by Sidey that he had complained to the Charterer, who promised to give the vessel prompt despatch. Sidey also, examined as a witness, speaks to these telegrams and the continued complaints and expostulations on his part, as well as the promises on the part of the Chaterers that the ship would have prompt despatch. The Captain also, on the 28th July, by the ministry of Murray Dodd, Notary, protested againts the Charterers for the detention, claiming damages. Their protest is produced.

The Captain and First Officer further prove, that the first coal received by the " Gresham " was the small quantity of 4 tons on the 25th July, being bunker coal for consumption and not cargo, and that she only commenced to receive cargo on the 4th of August and her loading was not completed until the 13th, that from five to five and a half days was a reasonable time for her to load a full cargo, that she had been unnecessarily detained for the space of 17 days and that the steamers " Alpha, " " R. M. Hunton," and " Crosby," as well as several small sailing vessels which had arrived after the " Gresham, " were given preference over and were loaded before her. The loss sustained by the detention of the " Gresham " at the rate of £50 Stg. per diem, is also proved by their evidence and also by a number of other competent witnesses examined for the owners.

For the defence but one witness was examined, M. F

Gisborne, who at the time of the shipment in question, was acting as agent for the company who furnished the coal. He produces a printed paper dated 1st July, 1873, which is eighteen days subsequent to the execution of the Charter Party in question. It purports to be Regulations of the Glasgow and Cape Breton (N. S.) Coal and Railway Co., limited, as to berthing vessels at the Pier.

These Regulations among other things provide: 1st The Pier head always to be supplied preferentially with coal (so as never to remain idle), and to be open to steamers over 1000 tons capacity, and vessels carrying over 1000 tons cargo *in regular turn*, but the sailing ships to vacate their berth when half loaded if so required by the Pier Master.

3rd Sailing vessels drawing over twenty feet when loaded to complete cargo at the end of the Pier without removal for a steamer or any other vessel.

4th A vessel shall be considered to be in turn after she casts anchor off the Company's Pier, and is reported at Mr. Gisborne's office as ready to take in cargo.

These Regulations, reasonable in themselves, made by a private company for their own convenience to facilitate their operations, were not of that public or authoritative character which imposed upon vessels arriving at the Port the obligation of a knowledge of their existence.

They were, to some extent, inconsistent with the Charter Party now in question, which certainly was not made in view of these provisions, and, if obligatory, it was incumbent upon the Charterers to find out their requirements, and to see to their being complied with.

Mr. Gisborne also produces a memorandum of extracts from a Shipping Book which, he says, was kept at the Port. In this, although in general the date of the arrival of other vessels is noted, that of the steamers affecting the question of priority in this case are not mentioned.

The first entry is as follows,—

S.S. "Kangaroo." Telegraph Cable Fleet. Commenced loading 19th July, completed 24th. Cargo, 761 Tons.

The entry of the "Gresham" is the second on the list, and is as follows:—

S.S. "Gresham" reported July 22nd. Commenced loading

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25th, completed August 13th. Cargo, 1830½ Tons. While that of the "Hibernia" is the sixth on this list, and is as follows :—

S.S. "Hibernia" Telegraph Fleet. Reported 19th July. Commenced loading 30th, completed August 5th. Cargo, 1901 Tons.

From these entries it is apparent that they were not made consecutively as the facts transpired, they are, therefore, in themselves and without extrinsic proof, unreliable

They are especially valueless as to the date of the arrival of the steamships coming in competition, as regards preferential loading.

From anything thereby made to appear both the "Kangaroo" and the "Hibernia" may have arrived after the "Gresham."

The "Kangaroo" being under 1,000 tons capacity, had no right, by the alleged Regulations, to load preferentially at the Pier head. She occupied six days in loading.

In proceeding with his evidence Mr. Gisborne says that, according to the rules of the Port, vessels got priority in the order in which they were reported to him, and entered in the shipping books. The "Gresham" was only reported to him on the 22nd July, the "Hibernia" on the 19th got coal before the "Gresham," as well on account of her priority of report as from her being one of the Telegraph Fleet, a tender to the Steamer "Great Eastern," then engaged in laying an Atlantic cable; that the "Gresham" actually got coal on the 25th July, before she was entitled to any, that is before the "Hibernia" had completed her cargo, while she was trimming. For the same reason the "Alpha" got coal while the "Gresham" was trimming. He also states that none of the Steamships that were reported or berthed after the "Gresham," were loaded before her, and that the stipulations of the Charter Party were carried out, except as to the explanations given about the Schooners at the inside berths, with regard to which, four in number, that got their cargoes before the "Gresham," he says the small sailing vessels received coal while the larger vessels were trimming or shifting their positions to get under the shoots, and to clear the cars, which could thus discharge by the side shoots where only small vessels could lie in shallow water, this coal not being under the circumstances, available for the large vessels,

and its discharge into the smaller ones rendering the track available for full trains."

He further states that, according to the rules of all coal Ports, vessels requiring bunker coal, that is coal for consumption, have a preference over those taking coal as cargo. That the Steamers "R. M. Hunton" and "Crosby" came for bunker coal only, and got it by preference, according to the rules of the Port.

He admits at the conclusion of his testimony that the "Hibernia" came in during the time the "Gresham" was in Port. This establishes the priority of the arrival of the "Gresham."

I think the case does not depend upon the question of the priority of the different vessels, but if it did, I should consider Mr. Gisborne's evidence insufficient to show a valid excuse for the delay.

The "Gresham" really ought to have got her cargo beginning on the 19th, the day of her arrival, as the "Kangaroo" was not of the capacity to occupy the Pierhead, and the omission to report was not the fault of the Captain, but of Archibald & Co., the Agents of the Charterers. She would then have had her load completed on the 24th.

The memo. produced by Mr. Gisborne gives the dates of the reporting of the "Gresham" and "Hibernia," and the days on which they and the "Kangaroo" began respectively to load, also respective days on which each completed the reception of cargo, but gives no precise information as to whether the loading was continuous, whether interrupted otherwise than for trimming, when the interruptions for trimming or otherwise commenced, and how long they were continued, how much coal was furnished to the smaller vessels at the side shoots, at what times and from what sources,whether the loading of the larger vessels went on at the same time and whether there was on hand, continously, a sufficient supply of coal to keep up the operation of loading. Such precise information would be necessary so as to make the absolute deductions from the long space of time intervening between the arrival of the "Gresham" on the 19th July, and the completion of her cargo on the 13th August, allowing for the necessary time, say five and a half days, to load the "Gre-

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sham" herself, and three days previous to the 22nd July, if the ship herself was in fault about reporting.

There is nothing whatever by which to measure the time, if any, lost by trimming. On the contrary the explanations go to show that, on the whole, no loss of time was thereby occasioned.

His remarks are no more satisfactory as to the "Gresham" getting coal before she was entitled to on the 25th July while the "Hibernia" was trimming. Trimming seems to be a necessary operation and is performed by the persons loading the vessel. It occupies at most some four or five hours usually, probably much less time. If one ship is interrupted for this purpose its successor has naturally her turn temporarily until the trimming is finished. She is, of course, the next in turn to avail herself of this temporary interruption, and if not, a loss of time would occur advantageous to none. Besides, the four tons of bunker coal, received by the "Gresham" on the 25th, could not have occupied but a few minutes at most in loading.

I find no good reason either in the application of the rule which he says exists as regards bunker coal having a preference at all coal ports. In the first place the terms of the Charter Party, in this case, would exclude its operation, they are express "to have preference in turn before sailing vessels." In the next place neither the "Kangaroo" nor the "Hibernia" took only bunker coal; as regards themselves, they took cargoes; whatever they might be, on board the "Great Eastern," the mere fact of her being engaged in laying a cable could not convert the cargoes of coal she was getting by other vessels into bunker coal on board these vessels.

But the real reason why the "Gresham" did not get her cargo in season, as gathered from the evidence, was not the interruptions adverted to, but because the coal did not exist there at the Port, it had to be waited for from the mine.

It is to be borne in mind that the contract in question was not one with the owners of the mine, but was one between the owners of the vessel and the Charterers. The owners of the mine might excuse themselves as regards the Charterers, but the contract of these latter toward the owners of the "Gresham" was to have a cargo of coal ready at Sydney and to ship it on demand. If any obstacles to its shipment had to

be overcome, such as complying with conditions exacted by the coal company, it was the business of the Charterers to have these obstacles removed, they were the parties to furnish and load the coal, and to get it from the coal company. If they required the Captain to conform to any formality, such as reporting his ship, they ought to have requested him to do so. It does not appear but that this report could have been made by Archibald & Co. themselves, and in all the telegrams that passed between the parties it was never either urged by the Charterers nor their agents, that the Captain was in default or should have reported the ship to Gisborne.

As regards the Charterers, I think the demand made on them for cargo on the 19th July was sufficient to put them in default, and that the owners' right to have a cargo furnished began on that day.

I think it is shewn by the evidence that up to the 4th of August they continued to fail to have a cargo ready for the "Gresham," the principal reason being that the production of the mines was not adequate to the demand.

I quote from Mr. Gisborne's evidence :

Question.—Did you give the "Gresham" coal as fast as she could take it ?

Answer.—We gave her coal as fast as we could deliver it ; as fast as facilities of the mines would allow.

Question.— What were thefacilities of the Port during that year for loading ?

Answer.—The facilities of the Pier were greater than the production of the mines.

Question.—Am I to understand that the facilities for loading vessels at the Port of Sydney in that year were very good ?

Answer.—They were very good considering they were a new company just starting in business.

Question.—And were the facilities of the Pier good ?

Answer.— Yes.

Question.—Then the vessels could have been loaded in a shorter time and with more despatch if the facilities at the mines had been better ?

Answer.—Yes.

Question.—How many tons of coal could you put on a vessel in a day ?

Answer.—We could put on more than we could receive

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from the mines. We could put on two hundred and forty tons in an hour.

In my opinion the Judge of the Lower Court construed the evidence correctly, at least in refusing to consider the very long detention sufficiently accounted for.

Without going into the precise figures as to the amount, I think the Court below were right in giving the owners judgment.

On the evidence as I read it, there seems to me to be no important question of law remaining to decide. I think no case can be found, which goes so far as to hold that the supply drawn from a mine at some distance must be waited for, and its sufficiency or insufficiency from the force of production, or the facilities of railway transit from the mine, considered to form part of the rules and regulations of the Port. The case of *Kearson vs Pearson*, cited by the owners, 31 L. J., Exchequer, R. P. 1, is directly contrary. See also the case of *Ashcroft vs* The *Crow Orchard Colliery Co.*, L. R. 9., Q. B. 541.

It seems to me that if the "Gresham" failed to get reported to Gisborne before the "Hibernia," it was the fault of Archibald & Co., the agents of the Charterers, who ought to have informed themselves on the subject, and to have at least warned Captain Bulkeley of the necessity of reporting to Gisborne, if they did not make the report themselves. That the "Kangaroo," according to the company's rules, had no right to continue loading at the Pier head in preference to the "Gresham." That neither the "Kangaroo" nor the "Hibernia" could be considered as only shipping bunker coals. That the "Gresham" should have been loaded within five and a half days of the 19th, that day inclusive. That as far as the Charterers are concerned they have failed to show any sufficient excuse for the detention of the "Gresham," and I think the owners entitled to judgment in their favor.

I quite admit that if rules of the Port had existed, established by any properly constituted public authority, all parties might have been bound to ascertain their provisions and conform thereto at their peril. I do not think that any such existed in the present case, but allowing the Charterers the extremest latitude in this respect, I do not think the whole delay nor the greater part of it is accounted for by the non

observance of these regulations, and the inobservance as far as important, that is reporting the vessel to Gisborne, was chargeable to the Charterers' agents, who alone could reasonably be supposed to be aware of this regulation. I do not think the cases cited by the Appellants are in conflict with this view. The case of *Postlethwaite* et al. v. *Freeland*, 27, W. R. is perhaps the strongest.

Lord Selborne says : " If an obligation undefinite as to time is qualified or practically defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that practice *which the Charterers could not have overcome by the use of any reasonable diligence*, ought in my opinion to be taken into consideration.

The case of *Kearson vs. Pearson*, relied on by the owners, is more applicable. It was there held that usual despatch meant the despatch of persons who have a cargo in readiness for the purpose of loading, and in the case of *Ashcroft vs. Crow Orchard Colliery Co.*, referring to the case of *Kearson vs. Pearson* Mr. Justice Lush says : that case establishes that the engagement to load with the usual " despatch " is absolute, and admits of no qualification so as to dispense with performance even where the performance was hindered by a casualty, which the Charterer could not prevent.

Ramsay J.—This is an action for damages by way of demurrage. There is no stipulation for a limited number of days,—what the freighter undertook to do was to give " prompt despatch." It seems to be well established that when the charter party fixes certain lay-days, all delays, beyond those days, until the ship is loaded and ready to sail, are at the charge of the freighters, unless directly attributable to the act of the owner (Smith's Merc. Law, 371 ; Abbott, 310). But when prompt despatch is alone promised, the freighter only warrants diligence (Abbott, 312-3), and diligence evidently means such proceedings as are usual in the port (Ib., 313). Now whether that diligence has been used here is almost purely a question of fact. Want of diligence—that is, negligence—has to be established by the Plaintiff. In this case I do not see that any negligence has been proved. It is pretended that the coal had to be procured after the vessel was ready to load, and that this was a cause of delay ; but it is evident that Sydney is a

coaling port, and that the coal is brought straight from the pit and is delivered on board. Again, it does not appear that the Steamer lost her turn, and certainly it does not appear she lost it by the fault of Appellant or their agents. I am to reverse with costs, and that is the judgment of the majority of the Court.

Mr. Justice Monk, as well as Mr. Justice Baby, concurred in this judgement

Judgement reversed

Kerr, Carter & McGibbon, for Appellants.
John Dunlop, for Respondents.

MONTREAL, 19 JANVIER 1882.

Coram DORION, J., C. RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 276.

ALFRED RACINE,

Tiers saisi en Cour de 1ère Instance.

APPELANT;

ET

JOHN KANE,

Demandeur en Cour de 1ère Instance.

INTIMÉ.

JUGÉ : Que la contrainte par corps n'a pas lieu contre un tiers saisi qui, ayant déclaré ne rien devoir au défendeur, a été condamné, sur contestation de sa déclaration, à rapporter un piano qu'il avait acheté du défendeur en fraude des droits des créanciers ou à payor au demandeur le montant de sa créance.

L'Intimé, ayant obtenu un jugement contre Marie-Louise Lesage, épouse de Paul Fournier, fit émaner un bref de saisie arrêt pour arrêter entre les mains de l'Appelant ce qu'il pouvait devoir, ou avoir en sa possession, appartenant à la Défenderesse.

L'Appelant déclara qu'il ne devait rien et qu'il n'avait rien appartenant à la Défenderesse.

Le Demandeur contesta la déclaration du Tiers Saisi alléguant qu'il avait, en sa possession, un piano qui appartenait à la défenderesse. Le Tiers Saisi répondit que la Défenderesse lui avait remis ce piano, en paiement d'une dette qu'elle lui devait, et qu'elle n'en était plus propriétaire lors du bref de saisie arrêt. Le Demandeur allégua que la Défenderesse

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était insolvable et qu'elle avait fait cette vente en fraude des droits de ses créanciers.

Sur cette contestation la cour de première Instance renvoya la saisie arrêt, mais sur appel la vente du piano faite par la Défenderesse au Tiers Saisi fut déclarée frauduleuse,et le Tiers Saisi fut condamné à rapporter le piano, ou à payer au Demandeur la somme de $226.16, montant de sa créance, (cette cause est rapportée au 24e Jurist p. 216).

Le Tiers Saisi n'ayant ni rapporté le piano, ni payé la dette, le Demandeur demanda, par Requête Sommaire, à la Cour Supérieure un ordre lui enjoignant de remettre le piano ou de payer sa dette et que, sur son refus, il fût, aux termes de l'art. 616 du code de Procédure Civile, déclaré être en mépris de Cour et condamné à être emprisonné commé gardien judiciaire jusqu'à ce qu'il eût remis le piano, ou payé la dette du Demandeur ou la valeur du piano.

La Cour de première Instance a jugé, que l'article 616 du Code de Procédure n'était pas applicable à cette cause et elle a renvoyé la demande pour contrainte par corps.

Ce jugement a été infirmé par la Cour de Révision, le 27 octobre, 1880, et le Tiers Saisi a été condamné à être emprisonné jusqu'à ce qu'il eût livré le piano, ou payé au Demandeur la somme de $226.16, avec intérêt à compter du 16 novembre 1877, deplus $349.88 pour frais taxés sur le jugement qui avait condamné le Tiers Saisi à remettre le piano et les frais sur la règle, ou la somme de $500, valeur du piano.

L'Appel est de ce dernier jugement.

DORION, J. C.—Le jugement de cette Cour, qui a annulé la vente faite au Tiers Saisi, l'a condamné à remette le piano, sans prononcer la contrainte par corps. La Cour de première Instance devait faire exécuter le jugement de cette Cour par les voies ordinaires et ne pouvait y ajouter une condamnation pour contrainte par corps, qui n'avait pas été prononcée contre lui

La Cour de Révision a commis une erreur en appliquant à l'appelant l'article 616 du Code de Procédure Civile. Lorsqu'un Tiers Saisi déclare avoir en sa possession des effets mobiliers appartenant au Saisi,le Code l'assimule à un gardien et l'oblige, comme un gardien ordinaire, à remettre ces effets mobiliers sous peine de la contrainte par corps. C'est le cas où l'article 616 reçoit son application. Mais ici le Tiers Saisi n'a pas dé-

Alfred Racine & John Kane.

claré qu'il avait, lors de la saisie, un piano entre les mains appartenant au Saisi. La Cour ne l'a pas déclaré non plus. Ce que la Cour a déclaré c'est que le Tiers Saisi avait eu du saisi un piano en fraude de ses créanciers et qu'il était tenu de rapporter ce piano, ou d'en payer la valeur.

Il est indifférent que le Tiers Saisi ait ce piano en sa possession ou non. Il l'a acheté et il a le droit de le garder s'il le veut. Tout ce que les créanciers du Saisi ont droit d'avoir c'est la juste valeur du piano, si le Tiers Saisi ne veut pas le remettre. Le Tiers Saisi n'était débiteur du piano que sous l'alternative d'en payer le prix. En ne remettant pas le piano dans le délai fixé par le jugement, il est devenu le débiteur porté au jugement et, comme tel débiteur, il n'est pas contraignable par corps.

Sous un autre point de vue, le jugement est encore mal fondé. La contestation de la déclaration du Tiers Saisi contenait une demande en révocation d'une vente faite en fraude des droits des créanciers, or les tribunaux en prononçant la nullité d'un tel acte et ordonnant la remise des objets cédés, ou leur valeur, ne prononcent jamais la contrainte par corps, et ce parce qu'aucune loi ne lès y autorise. Si le jugement de la Cour de Révision était maintenu, il établirait en faveur du créancier, qui, en contestant la déclaration d'un Tiers Saisi, ferait mettre de coté une vente faite en fraude de ses droits, le droit de faire emprisonner ce Tiers Saisi, droit qu'il n'aurait pas eu s'il eût fait annuler le même acte par une action révocatoire ordinaire.

Pour ces raisons nous croyons que le jugement de la Cour de Révision doit être infirmé et celui de la Cour de première Instance confirmé. La règle pour contrainte par corps est renvoyée avec dépens.

Jugement infirmé.

R. & L. Laflamme, *pour l'Appelant.*
Doutre & Joseph, *pour l'Intimé.*

MONTREAL, 24TH JANUARY 1882.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, J. J.

No. 468.

ALICE LOUISA ROSS & *vir.*

Defendants in Court below,
APPELLANTS;

&

DAME JANE ROSS & *vir.*

Plaintiffs in Court below,
RESPONDENTS;

QUESTION: Appointment of sequestrator to estate pending an appeal.

DORION, C. J.—The female Respondent has obtained, by the judgment of the Inferior Court, the removal of the female Appellant from the executorship of the will of the late John Ross, their father. An appeal has been taken from this judgment and the Respondent moves that a sequestrator be appointed to take charge of the property pending the appeal. The property consists of real estate; no application has been made in the Court below for the appointement of a sequestrator, and the Court made no order to that effect by its final judgment.

The Respondent has not established any new fact and does not show that she is exposed to any damage unless a sequestrator be appointed. Under these circumstances, without deciding upon the right of this Court to appoint or not a sequestrator, (1) we reject the petition on the ground that no case has been made out. It is merely a demand that the judgment be executed by provision. The petition is therefore rejected.

Petition rejected.

RITCHIE & RITCHIE, *for Appellants.*
KERR, CARTER & McGIBBON, *for Respondents.*

(1) In the case of *Donohue & Génier*, C. J. Duval, on the 8th June 1870, gave an order, in chamber, that a sequestrator be appointed pending the appeal, on affidavits establishing that the Respondent was committing waste; see also art. 876 & 1166 of the Code of Civil Procedure.

MONTREAL, 24 MARCH, 1882.

Coram Dorion, C. J., Ramsay, Tessier, Cross, Baby, J. J.

No. 321

JAMES BAYLIS & al.,

Defendants in the Court below,

Appellants;

&

O. W. STANTON,

Plaintiff in the Court below,

Respondent.

To effect a composition with his creditors, James Baylis gave his notes endorsed by McKeand, who as security took an assignment of the estate including a property in the City of Montreal. McKeand leased this property to the appellants James Baylis & Son and subsequently reconveyed the property to James Baylis with right to recover the rents accrued or to accrue. Subsequently the Respondent was appointed sequestrator to the property in a hypothecary action by Crossley & Sons against McKeand and sued appellant, to recover the rent from date of lease by McK. to the date of his appointment.

The Court expressing strong doubts as to the propriety of the appointment of a sequestrator in such a case, and reversing the judgment of the Court below.

Held 1o That the transfer of rent by McK. to Baylis did not require to be registered to enable Baylis to receive the rents.

2o That the receipts *sous seing privé* given by Baylis to the appellant, were *primâ facie* evidence that the rent had been paid at the date of the receipt and that it was for the Respondent to establish the contrary.

This action was brought by the Respondent, in his capacity of Sequestrator appointed to a certain property leased to the Appellants, to recover $3,250 for rent accrued up to the 1st of August, 1880.

The facts which gave rise to the demand are as follows :

In the month of August, 1874, James Baylis, one of the Appellants, was put in insolvency, under the Insolvent Act of 1869, at the suit of one of his creditors, and his estate was placed in the hands of A. B. Stuart, his assignee. Subsequently the Insolvent made a composition with his creditors by giving them his own notes endorsed by Anthony McKeand, of Toronto, for twenty cents on the dollar of the amount of their claim payable in six, twelve and eighteen months. A deed of composition and discharge was passed on the 14th of December, 1874, in which it was stipulated, that, in order to secur McKeand for the notes he had endorsed, the assignee should transfer to him, or to such other person as he and Baylis might direct, the whole of the Insolvent estate of the latter.

In pursuance of this stipulation, the assignee, by deed of the 31st of December 1874, transferred to McKeand, the estate of the Insolvent, including a certain property situate on Notre-Dame Street, of the city of Montreal.

On the 12th of February, 1877, James Baylis acting as the authorized agent of McKeand, leased the Notre-Dame Street property to the firm of James Baylis & Son, composed of the said James Baylis and of his son Samuel W. Baylis, for a term of six years, from the 1st day of May then next, at a rental of $1000 *per annum* payable quarterly. McKeand by a subsequent deed passed on the 8th of November, 1878, reconveyed to Baylis, this same property, without any warranty, and subject to all existing charges and leases, for the nominal consideration of one dollar. By this deed it was declared that Baylis was already in possession of the reconveyed property and McKeand subrogated him in his rights to receive all rent due or to become due under said leases. The parties further declared, that this was the only property of the insolvent estate of Baylis which had not been reconveyed to him, and the parties gave each other a mutual discharge.

Subsequently to all this, but before this last deed had been enregistered, John Crossley & Sons instituted an hypothecary action against McKeand as *tiers détenteur* of the above mentioned property. Baylis claiming to be the proprietor and in the actual possession of it, by virtue of the deed of the 8th of November, 1878, intervened in the cause to protect his rights.

The Plaintiffs then petitioned the Court to have a sequestrator appointed. This was opposed by Baylis, but his objections were overruled, and on the 31st of July, 1880, the Respondent was named sequestrator "*to take possession of, and administer, the said property and to collect the rents thereof whether passed, present, or future.*"

It is under this appointment, as sequestrator, that the Respondent has brought this action by which he claims from the Appellants all the rent accrued under the lease of the 12th of February, 1877, embracing a period of thirty nine months from 1st of May, 1877, to 31st of July, 1880

The action was accompanied by a writ of *saisie gagerie* and by his conclusions the Plaintiff demanded that, in default of payment of the rent, the lease be resiliated and the Appellants ousted from the premises.

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The Appellants, by two separate demurrers to the declaration, contended that the Respondent had not shown by his allegations that he had any other right but that of administering the property and of collecting the rents, and that he could not demand the resiliation of the lease, nor the expulsion of the Appellants from the premises.

They further pleaded, that by reason of the deed of reconveyance from McKeand to Baylis of the 8th of November 1878, they were not indebted to McKeand, nor to the Plaintiff the present Respondent for rent, and that the rent they owed under their lease was now payable to James Baylis, one of them ; that McKeand never possessed the property *animo domini*, but as mere trustee for Baylis, and finally that they had paid Baylis all the rent that had accrued up to the institution of the action and that they owed no rent.

The Respondent by special answer alleged the circumstances of his appointment as sequestrator, and that the deed of the 8th of November, 1878, not having been registered until after the hypothecary action of Crossby & Sons had been instituted, could not be invoked against the present action.

Special replication of the Appellants, that the Respondent should have alleged in his declaration his appointment as sequestrator and that he could not do so by special answers.

The evidence which consists in the several deeds invoked by the parties respectively and in the admissions given by the appellants.

1st That the Respondent was appointed sequestrator in the hypothecary action of Crossley & al vs. McKeand.

2nd That it was alleged, in this action, that McKeand was the proprietor and détenteur of the premises in question in this cause.

3ly That Baylis had filed an intervention by which he claimed he was proprietor and entitled to collect the rents, which intervention was still pending.

4ly That the transfer of the 8th of November, 1878, was registered after the institution of the hypothecary action by Crossley and others.

The Appellants produced and proved three receipts from James Baylis to them, for the rent accrued up to the 1st of August, 1880, respectively dated 31st of December 1879, 10th May, 1880 and 29th of July, 1880.

The Court below, dismissing the demurrers and the pleas of the Appellants, has condemned them to pay the $3,250 demanded for rent. The judgment declares the *saisie gagerie* valid for the rent claimed and binding for the rent accrued since the demand ; it also cancels the lease and orders the Appellants to vacate the premises within three days after service thereof.

DORION, C. J.—It is difficult to understand how mere hypothecary creditors as Crossley & Sons, who were suing their hypothecary action against McKeand, as *tiers détenteur*, could, pending their action, have shown that they had such an interest in the rents of the property hypothecated as to entitle them to obtain the appointment of a sequestrator to collect those rents,not only since the institution of their action, but also those which had accrued long before. —Article 2076 C. C. merely gives to hypothecary creditors the right to recover from the *tiers détenteur* the rents and profits which the latter has received since he has been summoned to give up the property (*délaisser*). This necessarily supposes that the *tiers détenteur* has been condemned to *délaisser*, until then there can be no claim against a *tiers détenteur* for rents, issues and profits, and still less to collect, from his tenants, the rents of the property hypothecated. Under art. 645 C. C. P. a sequestrator can be appointed at the request of a seizing creditor after an opposition has been made and not before. There seems, to be no reason why an hypothecary creditor should, in the absence of any text of law, have any more rights in this respect than a judgment creditor.

The propriety or impropriety of appointing a sequestrator is not, however, the question we have to decide in ihe present case.

The Appellants, as lessees of the premises have no right, as such, to question an appointment which has been made in another case, wherein James Baylis, one of them, was an intervening party and is bound by the judgment rendered against his pretentions, and in fact they have not done so. They merely challenge the extent of the authority of the sequestrator, 1st as to his demand for the cancellation of their lease,and 2ly as to his right to claim rent which, as they allege,

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was not due to McKeand, but to James Baylis, his representative, to whom, they contend they have paid it.

On the first point, we are disposed to agree with the Court below, that the authority given to the Respondent to administer the property and to collect the rents, involves the right to cancel existing leases for adequate causes, such as the non payment of the rent. —(Article 1624 and 1625 C. C.)

To determine the second point intelligently, we must examine the object for which the Respondent was appointed sequestrator. The appointment took place at the request of the Plaintiffs in a case of Crossley & Sons against McKeand. The rents that the sequestrator was authorized to collect were those due or supposed to be due to McKeand. They could not be those due to James Baylis, who was not a defendant in the cause and against whom Crossley & Sons had made no demand. Baylis was not in the cause to answer to any claim which was made against him, but to protect his right to the property he had purchased from McKeand and on account of which McKeand was sued hypothecarily. The Court, in appointing a sequestrator, acted no doubt under the apprehension that the titles of Baylis to the property not having been registered till after the hypothecary action had been brought, were not available as against the action of Crossley & Sons, which was then pending. This assumption seems to be in conflict with two decisions of the Chief Justice of the Superior Court, who held in *Drouin* vs. *Hallé*, 7 Quebec L. R., 148 and in *Dorval* vs. *Bourrassa & Bourrassa, opposant*, same vol. p. 303, that a purchaser could oppose a seizure of real estate made on his vendor, although his deed of purchase had only been registered after the seizure. It is not necessary to decide in the present case the important question, as to the effect of a deed of sale not registered till after an hypothecary action has been brought, and therefore supposing that Baylis could not invoke, as against Crossley & Sons, the sale made to him by McKeand, on the 8th of November, 1878, because he had not registered his title till after the institution of their hypothecary action, this could only apply to that portion of the deed conveying a title to the realty and could not affect the transfer by McKeand to Baylis of existing leases and of the rent accruing under such leases. Such a transfer does not require to be registered except to preserve the rights of the transferee,

as regards subsequent transferees. Art. 2127 c. c.) Crossley & Sons were not the transferees of either the leases or the rents of the property leased to the Appellants, and therefore there was no necessity for Baylis to enregister his transfer as against them.

James Baylis as being in the rights of McKeand was, therefore, alone entitled to claim the rents due by the Appellants and the receipts given by him were good and valid discharges. These receipts, three in number, show that the rent was paid up to the first day of August, 1880, the appointment of the Respondent as sequestrator having taken place on the 31st of July, 1880, there was then no rent due, the last quarter having been paid on the 29th of July preceding.

The Court below has, however, set aside these payments, on the ground that it was not proved that the receipts had been given prior to the institution of the action. The receipts are all dated prior to the institution of the action. The Respondent has raised no issue as to their having been given at the time they respectively bear date. It was for the Respondent to allege and to prove that the receipts were antidated and were only given after his appointment as curator.

Private writings are legal proof between the parties, their heirs and legal representatives. (Art. 1222 c. c.). The Respondent is the representative of the parties to the cause in which he was appointed sequestrator, that is of Crossley & Sons who were Plaintiffs, of McKeand the Defendant, and of James Baylis, the Intervening party. As representing Baylis the dates of the receipts are established by the receipts themselves, —these dates are also established as against McKeand who is the *cédant* of Baylis and who, by his transfer, has autorised Baylis to collect these rents — as to Crossley & Sons, if they have any interest in contesting the date of the receipts, it is as being the hypothecary creditors of McKeand and as such they are to be considered as the representatives of McKeand against whom the dates of the receipts are *primâ facie* evidence.

These propositions are clearly established by numerous decisions cited by Sirey in his Code Civil Annoté under Art. 1528. Nos 11, 31, 35, 37, 38 and 39, and by the concurrent opinion of the authors which this writer cites. It is principally with reference to receipts for rent that their date has been held to

be *primâ facie* evidence against parties connected with the signers of such receipts either as *cédants* or *mandants*, or creditors. To hold otherwise would be to oblige a tenant to take a notarial discharge for each payment of rent he would make, which is an impossibility.

The Respondent himself felt that it was for him to destroy the effect of the receipts produced by the Appellants, and although he had raised no contestation on this point, he has attempted to prove by the Appellants and by compelling them to produce their books that the receipts were fictitious In this he has completely failed, as the entries in the books show that the rent has been paid at the dates and in the manner indicated in the receipts.

This Court, holding that the transfer of rent made by McKeand to Baylis did not require to be enregistered in order to entitle the latter to receive the rent due by the Appellants and that the unimpeached receipts produced by the Appellants show that, before the appointment of the Respondent as sequestrator, they had paid to James Baylis, who alone was entitled to receive the same, all the rents then due and now claimed by the Respondent, is of opinion to reverse the judgment of the Court below and to dismiss the action of the Respondent.

Judgment reversed.

ROBERTSON & FLEET, *for Appellants.*
JOHN L. MORRIS, *for Respondent.*

MONTREAL, 24TH MARCH, 1882.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, BABY, J. J.

No. 192.

THE CANADA SHIPPING CO.,

Plaintiffs in the Court below
APPELLANTS.

&

THE VICTOR HUDON COTTON CO. HOCHELAGA,

Defendants in the Cour below
RESPONDENTS.

Reversing Judgment of the Superior Court,

HELD : 1st That Appellants had a right to bring action to recover the price of coal sold by their agents in their own name and without disclosing their principals. [DORION C. J. AND RAMSAY J. diss.)

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2ly That Respondents, who had made their option to take delivery of the coal in bulk according to quantity mentioned in the Bill of Lading instead of having it reweighed, were precluded, by their agreement, from claiming a reduction in the price for deficiency in the quantity, if they did not prove fraud, and also by their delay in notifying the vendors only several weeks after delivery and when the coal had been mixed with other coal so as to prevent verification.

DORION, C. J.—This action was instituted by the present Appellants to recover $3,038.44 being the price of 810 tons 500 weight of steam coal sold by their agents Thompson, Murray & Co., through J. S. Noad, broker, as per following bought and sold notes.

" *N°.* 3,435. *Montreal*, 13th *August*, 1879.

" Messrs. THOMPSON, MURRAY & Co.

" I have this day sold for your account, to arrive, to the V' " Hudon Cotton Mills Company, the 810 tons 5 cwt. best " South Wales Black Vein Steam Coal, per Bill of Lading per " Lake Ontario, " " at $3,75 per ton of 2,240 lbs, duty paid ex " ship to have prompt despatch.

" Terms, net cash, on delivery, or 30 days, adding interest, " buyer's option.

" Brokerage payable by your buyer to have privilege of " taking Bill of Lading or reweighing at seller's expense.

" Your obedient servant,

" (Signed) J. S. NOAD.

" Broker. "

The Respondents met the demand by a plea, that the contract was with Thompson, Murray & Co., personally, and that the Appellants had no action, and, by a second plea, that the cargo contained only 755 tons 580 lbs, the price of which was $2,868.72, which they had offered to Thompson, Murray & Co. together with the price of ten tons more to avoid litigation, in all $2,890.72, which they brought into court without acknowledging their liability to the Appellants, and prayed that their action be dismissed as to any further or greater sum.

It is proved that the Respondents accepted to take the coal as per Bill of Lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors and the cargo was found to contain only 755 tons 580 lbs. About three weeks after having received the Bill of Lading, when called upon to pay they claimed a reduction for the deficiency.

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Hence the two questions :

1st Can a principal bring an action upon a contract made by an agent acting in his own name and without disclosing his principal ?

2ly Are the Respondents, under the circumstances, bound to pay for the quantity of coal mentioned in the Bill of Lading, or are they entitled to a reduction for the deficiency according to their own weighing ?

Upon the second question we are, I believe, all of opinion that the Respondents having made their option to take the cargo of coal for the quantity mentioned in the Bill of Lading instead of having it reweighed with the sellers, as they were entitled to, can not claim a reduction in the price on account of deficiency in the quantity, except on the ground of fraud, and there is no fraud proved in this case. It would be extremely dangerous to allow a purchaser who has chosen to receive delivery in bulk and without weighing, to assert two or three weeks after such delivery and after the coal has been mixed with other coal, so as to prevent any verification by the seller, that there was, according to his own calculation, a deficiency for which he is entitled to a reduction in the price of his contract. The Respondents are, we consider, by the option which they have made to receive the coal in bulk, precluded against claiming a reduction of the price of the coal.

Moreover, their laches in not giving notice of their intention to weigh the coal and in mixing it with other coal, so as to prevent verification, before they informed the sellers of the pretended deficiency would, in any ordinary case, be sufficient to reject their claim for a reduction and we are, therefore, of opinion that on both these grounds the tender made by the Respondents is insufficient.

On the other question, that is as to the right of the Appellants to bring an action on the contract made by their agents, Thompson, Murray & Co, acting in their own name, there is a difference of opinion and on that point I have the misfortune, with the learned Judge sitting on my left (Judge Ramsay), to dissent from the judgment about to be rendered.

If this question had to be decided according to English practice, there might perhaps be no objection to an action being taken by a principal on a contract made by his agent in his own name and without disclosing his principal.

Yet this practice seems to be based on a mere rule of expediency, for it would appear that the principal cannot bring an action upon a contract made under seal, by an agent acting in his own individual name. (Story, on agency, p. 498 § 422. *Sims & Bond* 5 B. & Ad. 393, 2 Smith Leading Cases, *Thomson & Davenport* p. 397.)

Some of the courts in the United States seem to have gone even further and to have held, that an action cannot be maintained by an undisclosed principal on a contract in writing made by his agent, unless such principal could maintain an action in *assumpsit.* (Dunlap's Paley, on Agency, 4th American edition, p. 324, Note A, where the opinions of Livingston, J., in the case of *The United States & Parmelee*, 1 Paine's C. C. p. 258, of Jewett, J. in *Newcomb & Clarke*, 1 Denio 226, to that effect are cited. See also case of *Taintor v. Prendergast*, 1 American Leading Cases, 626 and note 642). Those distinctions between actions on a contract under seal and those on a contract not under seal do not exist with us. We have not therefore to consider what is the practice elsewhere, but our own which is derived from the civil law.

Story, on Agency, after stating, under § 154 & notes, the practice both in England and the United States, at § 163 thus refers to the rules of the Roman Law ; " In general the prin-" cipal, although bound by the act of his agent, was not per-" sonally and directly liable to the other contracting party, " nor could he enforce the contract against the latter. The " only immediate remedy (*actio directa*) was between the " immediate parties to the contract ; that is the agent and the " other contractor. Thus Pothier states it as the undoubted " rule, (and he is confirmed by other civilians), *Ex contractû* " *procurationis, actio regulariter procuratori et adversus* " *procuratorem quœritur ; non autem domino aut ad-* " *versus dominum.* There were exceptions to this rule, " as was before intimated ; but they were principally " introduced by the prœtor as a matter of equity and hence " called *actiones utiles*, in which the contract of an agent " would be enforced against his principal ; as for example in " cases of exercitors or owners of ships, by the *actio exercitoria* " and in other agencies of a common nature in trade, such as " the *actio institoria* against shop-keepers and others acting " through agents, (*institores* and *procuratores*,) in favor of com-" merce.

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At § 425 the author says: "By the Roman Law, as it originally stood, the principal could not ordinarily sue or be sued on the contract made through the instrumentality of his agent; but the latter was generally treated as the sole contracting party. This was subsequently altered by the edicts of the prœtor, *so far as it respected the rights of third persons to institute suits against the principal*, in cases falling within the reach of the exercitorial and institorial actions. But the exercitorial action did not lie in favor of the owner or employer (*exercitor*) against the other party contracting with the master."

§ 426 "The institorial action was also, in its terms, apparently limited to suits *against the principal. Æquum prætori visum est, sicut commoda sentimus ex actû institorum ita etiam obligari nos ex contractibus ipsorum et conveniri.* But no like action lay against the other contracting party."

Story, § 163 already cited, says: "And it would seem that in the modern nations recognising the Civil Law as the basis of their jurisprudence the like action (*actio civilis*) will generally lie by or against the principal upon the contract of his agent."

This may be admitted to be correct if the rule is limited to cases to which the *actio exercitoria* and the *actio institoria* applied, that is to cases when the agent is generally and publicly known to be acting as a *préposé*, such as the master of a ship, the manager of a bank, of a manufacturing company, shop or other commercial enterprise, because then third parties know they are dealing with an agent acting in most cases for a known principal, but it does not apply as regards the action of the principal against third parties in the case of an ordinary agent acting in his own name and without, as in the present case, disclosing either his principal, or his quality of agent, and the authorities which Story cites in support of his proposition do extend its application beyond the limits we have just stated, (Pothier, Obligations nos 82, 447, 448; Mandat, no 88; 1 Bell's commentaries, 5 ed. pp. 479, 480; 1 Stair's Inst by Brodie, B. 1, T. 12, § 16.

Casaregis, Disc. 96, no 2 cited by Delamarre & Le Poitvin vol. 3, p. 71, no 41, says "Lorsque le mandataire contracte purement et simplement sans parler de son mandat, le contrat *s'enracine* tellement en lui, qu'il ne peut compéter aucune

" action au mandant contre le tiers. " "*Et enim quando man-*
" *datarius simpliciter contrahit non expresso mandato, adeo in*
" *eo radicatur contractus, ut mandati amplius contrà tertium*
" *nulla competere possit actio.* "

The same writers also cite at page 74, n° 44, of the same vol. the text of the articles of the Spanish and Portuguese codes to show that they have followed the rules of the civil law.

If we come to our own Code, we find that the matter has been diposed of in articles 1716 and 1727, which are as follows:

1716 " A mandatary who acts in his own name is liable to
" the third party with whom he contracts *without prejudice to*
" *the rights of the latter against the mandator also.* "

1727 " The mandator is bound in favor of third persons for
" all the acts of his mandatary etc. "

This last article completes the first in this, that it declares that in every case except the one provided by art. 1738 and the usages of trade, the mandator is liable towards third persons who have contracted with his agent, without any distinction as to whether such agent acted in his own name or not. This is perfectly consistent with art. 1716 which reserves to third parties their rights against the undisclosed mandator, in addition to their recourse against the agent who has acted in his own name.

The commissioners who prepared the Code, in their comment upon this section of their work commencing with art. 23. now art. 1727, of the Code, say: " There are five articles in
" this section; the first of them numbered 23 announces the
" general rule of the liability of the mandator and does not
" materially differ from art. 1998 of the Code Napoléon, Trop-
" long, however, puts the construction upon that article that
" the mandator is not bound when the contract is in the
" name of the mandatary without the name of the other being
" disclosed, except in certain cases. This is in harmony with
" the doctrine of the Roman law; but it is directly against
" the rule declared by Pothier, with whom the English,
" Scotch and American law coincides. The article we submit
" is based upon Pothier's statement of the rule and includes
" all acts of the mandatary whether in his own name or in
" that of his principal. The only exceptions being those indi-
" cated in the article. "

The intention of the Commissioners is here clearly enun-

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ciated. They intended to follow the rule as stated by Pothier, who, while he gives to a third party who has contracted with an agent acting in his own name an action against the principal, gives none to the principal against the third party, (Pothier, obligations, nos 82, 447 & 448, and Mandat, no 88). This rule has been strictly followed in art. 1716 & 1727 and is made still more evident by the fact that in other cases, such as those provided for by articles 2390 & 2408, the Code has expressly given an action to the principal against third parties who have contracted with an agent acting in his own name. This would not have been necessary if the general rule had been that the principal could always sue in his own name.

The principal is not, however, without recourse against third parties, but he must either obtain a transfer of the rights of his agent (art. 1571 c. c.), or he must exercise them by a special action, under the provisions of art. 1031 c. c.

That this is the view taken by the modern French writers is shown by the following references to their works.

Duranton, vol. 18, p. 262, no 262; Paul Pont, vol 1, Petits Contrats, on art. 1998 of the French Code, nos 1060 & 1061; Zachariæ, vol. III, p. 133, § 405, no 3. Troplong, du mandat, nos 522, 535 & 543; Delamarre & Le Poitvin, vol. 3 p. 93, nos 55 & 57, p. 182, no 123; Demolombe, vol. 24, p. 271, no 287; Aubry & Rau, vol. 4, p. 652, § 416, no 8; Laurent, vol. 15, p. 633, no 555 & vol. 28, p. 62, no 62, p. 64, no 63; Audicq c. Hannapier & Louzeau-Coudrais, 26 juillet 1843, Sirey 1844, 1, 194, & notes 1, 2 & 3.

Most of these authors seem to deny, as Troplong does, the right of the third party to bring an action against the undisclosed principal, but that is no doubt due to the fact that the French Code contains no provision corresponding to article 1716 of our own Code.

From these considerations I have come to the conclusion that under the provisions of our Civil Code the Appellants had no right to sue upon the contract made by Thompson, Murray & Co. (1).

(1) There are only two reported cases in which this question seems to have been raised before our Courts.—The first is the case of *Reid & Birks*, (2 L. C. J. 161) in which Mr. Justice Mondelet, on the authority of Smith's mercantile law maintained the action of the principal against the third party. The second case is that of *Labelle & Patris* (4 Revue Légale, 530).

It has however been suggested that the Respondents had by their tender waived this objection. I do not think so. The Respondents by their first plea have contested the right of action of the Appellants upon the legal ground that they had never contracted with them. By their second plea, without admitting the Appellants' right of action, but on the contrary under reserve of the conclusions taken by their first plea, they say that if the Appellants have any right of action they are only entitled to the sum they have tendered to Thompson, Murray & Co, which sum they bring into court. I consider this cannot be considered as a waiver of the first plea. The second plea is subsidiary to the first and contains a tender in case the first plea is overruled. We have first to decide on the merits of the first plea; if well founded the action was rightly dismissed; if it is unfounded then we have to consider whether or not the Appellants are entitled to more than the amount brought into court and which has been refused by the Appellants. Taking this view of the case I would confirm the Judgment of the Court below.

RAMSAY, J.—The appellants sued the respondents for the price of a quantity of coal, $810.05, on a special action setting up that Thompson, Murray & Co were their agents for a long period, and that through them appellants sold to respondents the coal in question.

The respondents met this action by a plea in which they said they never knew appellants in the matter, that they bought from Thompson, Murray & Co., and that they were ready to pay them and were not bound to pay appellants.

It appears that in England a special action of this sort can be brought, even when there is a contractin writing, provided the contract be not under seal (Collyer on Partnership, 653); and the contract may probably be produced in proof. But the action cannot be brought on the writing: (Dunlap's Paley, Ag., No 324, Note A.) It seems to me that such a rule is contrary to strict principle, and English writers know well enough that the rule of the civil law differs from the rule of the common law (Story, Agency, 164). We must be governed by

in which Mr. Justice Loranger also maintained the action, but condemned the Plaintiff to pay all the costs, intimating thereby that he thought the action had not been properly brought. These cases were both decided in the Circuit Court.

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the law of France on the point. It seems perfectly clear that under our system no such action can be brought. Many authors hold that not only the principal cannot sue, but cannot be sued. It was argued that this was true, but that our code had laid down a rule that necessarily implied that the principal must have such an action. Article 1727 C. C. having given to the purchaser the right to sue the undiscovered principal to force him to fulfil the obligations of his agent, the reciprocal action must lie. But I do not see that this follows, and in France many writers held with Pothier that the purchaser might go past the agent and attack the principal directly. (See Troplong. Mandat, 435 and following, and the decisions he reviews.) The principle is this —a legal relation is created by equity between the undiscovered mandator and the other party, and not by the contract. There is no inconvenience in his proceeding without calling in the mandatary, or at any rate it is an inconvenience only to himself. But if the undiscovered principal sues the other party without putting the mandatary *en cause*, the defendant is liable to another suit. No evidence, not even an admission, would put him in the position he has a right to be in. He is entitled to be enabled to plead the *res judicata*. It has been said, if the agent is insolvent can't you follow your property ? I think you can, but that case involves different principles ; and the necessity of putting the interested parties *en cause*, equally exists.

We now give the judgment rendered in the Superior Court, March 31, 1880, Mackay, J. presiding.

" The Court, etc...

" Considering that plaintiffs have failed to prove liability of defendants' Company towards them, as alleged ;

" Considering that the sale of coals in this cause was by Thompson, Murray & Co, to defendants, and that the broker's notes, and also letter of 13th August, 1879, show that ; considering that from them the defendants could not discover the plaintiffs as the vendors ;

" Considering that Thompson, Murray & Co., sold the coals referred to to the defendants' Company ; that Thompson, Murray & Co. kept silence as to the existence of quality of mere agents in them, acted in their firm particular name, and did not take quality of agents in or at the contract of sale ; that Thompson,

Murray & Co. ought, under the circumstances, to be held for all the purposes of this case or suit, the veritable sellers (*vide* N° 522, Troplong, Mandat), and so the defendants' first plea must be maintained ; The Canada Shipping Co. & The Victor Hudon Cotton Co.

"Considering that in and at that sale of coals, Thompson, Murray & Co. did not engage *pour autrui*, nor did defendants promise towards any *commettant*, but only towards Thompson, Murray & Co. ;

"Doth dismiss plaintiffs' action with costs."

The following is the judgment of the Court of Queen's Bench.

"The Court, etc......

"Considering that the appellants, plaintiffs below, have proved, by legal and sufficient evidence, the liability of defendants' company, the now respondents, towards them, as alleged in this demand ;

"Considering that on the 13th of August, 1879, the appellants acting by Thompson, Murray & Co., through their broker, James S. Noad, sold to respondents a cargo of coal, then to arrive on the ship "Lake Ontario," at $3.75 per ton of 2,240 lbs., said cargo to contain, according to the Bill of Lading, 810 tons 5 hundred weight, and the terms of payment being net cash, or at 30 days with interest added, at respondents' option, and with the further option of taking the cargo at the weight given on the face of the Bill of Lading, or of having it reweighed at the expense of said appellants, brokerage payable by the latter ;

"Considering that the said appellants through their said agents Thompson, Murray & Co., acting as aforesaid by the said James S. Noad, deliverd the said cargo to the respondents who accepted the same without having it re-weighed at seller's expense as they had a right to do, according to the terms of the said sale, such as mentioned in the bought and sold note addressed by the said J. S. Noad to the said Thompson, Murray & Co., on the said 13th day of August, 1879 ;

Considering that it was only after the delivery of the said coal and its acceptance, that the respondents caused it to be

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weighed, and found that the said coal was considerably defective in quantity, it being, in fact, short of 89 tons;

"But considering that said weighing was so made by the said respondents in the absence of the appellants, and without notice to them, and that, at a time when the said respondents were bound by the option they had previously made, and therefore had no right to refuse payment for the said cargo on the ground of a deficiency in the delivery;

"Considering that the liability of the principal towards third parties for the acts of his agents is reciprocal, and that actions and remedies which could be waged by third parties against a principal not named in the contract, could also be enforced by the principal against third parties, according to the nature and extent of the former's rights;

Considering that the appellants are a Canadian corporation and would have been jointly with their said agents or severally liable towards the respondents for the said deficiency of 89 tons in the quantity of coal sold by them to the respondents through their said agents acting as aforesaid, had not the respondents forfeited their rights in that respect by their acceptance of the coal as above stated;

"Considering, moreover, that the respondents in tendering, as they have done, in this suit, and depositing into Court the sum of $2,890.72 as the value of the quantity of coal actually received by them, have acknowledged their liability towards the said appellants, and that the action in this cause has been properly brought, and should have been maintained by the judgment appealed from, and that such tender is insufficient;

"Considering, therefore, that in the said judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal on 31st of March, 1880, by which the action of the plaintiffs now appellants, was dismissed with costs, there is error;

"The Court now here, proceeding to render the judgment which the said Court below ought to have rendered, doth condemn the defendants, now respondents, to pay to the appellants, plaintiffs below, the sum of $3,088.44, as the value of the said cargo of coal, according to the said Bill of Lading, with interest from the 3rd of September, 1879, at the rate of 6 per cent. per annum, and the costs incurred by the said plain-

tiffs, appellants, as well in the Court below, as in this Court (the Hon. Sir A. A. Dorion, Chief Justice, and Mr. Justice Ramsay dissenting).

Judgment reversed.

Davidson, Monk & Cross for Appellants.
Béique & McGoun for Respondents.

MONTRÉEAL, 27 SEPTEMBRE, 1882

Cornm DORION, J. C., MONK, RAMSAY, TESSIER, CROSS, J. J.

No. 566

McCORD,

APPELANT ;

ET

McCORD.

INTIMÉ.

JUGÉ : Qu'un procureur, qui a obtenu distraction de dépens en Cour de première instance, ne peut intervenir en Cour d'Appel pour protéger ses droits à l'encontre d'une transaction faite entre les parties, surtout s'il n'allègue ni fraude, ni que ses droits son' en péril à raison de l'insolvabilité de la partie pour laquelle il a occupé.

DORION, J. C.—Cette action a été portée pour faire résilier un acte de donation ou de cession d'immeubles. L'action a été renvoyée en Cour de première instance. La Cour de Révision a infirmé le jugement et il y a appel du dernier jugement. M. Driscoll qui occupait comme procureur du demandeur en cour de première instance et aussi en Cour de Révision, présente une requête par laquelle il allègue qu'il a obtenu distraction de dépens en vertu du jugement en révision ; que depuis l'appel, les parties ont transigé et qu'ils refusent de lui payer ses dépens. Il conclut à ce qu'il lui soit permis d'intervenir en appel pour protéger ses droits, et faire débouter l'appel.

La distraction de dépens qui est accordée par la cour équivaut à une cession ou transport judiciaire du montant des dépens auxquels une partie est condamnée ; mais l'efficacité de ce transport dépend de la décision finale, en sorte que si le jugement accordant la distraction de frais est infirmé, le droit de l'avocat distrayant s'évanouit. De même il a toujours été maintenu que l'avocat distrayant n'est pas partie au jugement et que, sur l'appel, il n'est pas nécessaire de le mettre en cause. Il ne lui est pas permis d'intervenir sur l'appel et

McCord & McCord.

les parties peuvent même transiger sans son consentement, sans qu'il puisse s'y opposer, à moins que la transaction ne soit pas de bonne foi et qu'elle n'ait lieu que pour le priver de ses honoraires. Dans la cause de Williams & Montrait (24 L. C. J. 144), nous avons confirmé le jugement de la Cour Supérieure qui, en donnant acte aux parties de la transaction qu'elles avaient faite entr'elles relativement à une action en séparation de corps et de biens, avait accordé distraction de dépens au procureur de la demanderesse, quoique par la transaction il eût été convenu que les procédures seraient discontinuées, chaque partie payant ses propres frais.

Mais dans cette cause, il paraissait évident que les parties, par la manière dont elles avaient transigé, voulaient priver le procureur de la demanderesse de ses honoraires.

Ici, il n'est pas même allégué que la transaction entre les parties ait été faite pour frauder le procureur de ses frais, ni qu'elle aura cet effet. Il ne paraît pas que la partie qui a employé le requérant soit insolvable, en sorte que ses droits ne sont pas en péril. Dalloz, 1833, 2, 33, cite un arrêt qui a rejeté l'intervention dans une cause en appel d'un procureur qui avait obtenu distraction de dépens en Cour de première instance, tout en lui réservant son recours contre les parties à l'appel. Il s'agissait là, comme dans la cause de Montrait vs. Williams, d'une action entre mari et femme, et l'arretiste, dans une note, explique clairement que le procureur qui a obtenu distraction de dépens ne doit jamais être considéré comme partie à l'instance et qu'il ne peut être reçu partie intervenante sur l'appel. " Mais si les parties, dit Dalloz, voulant " frustrer l'avoué de ses droits, ont fait une transaction frau- " duleuse, ou se sont entendues pour faire infirmer le premier " jugement, la distraction prononcée devra toujours avoir son " effet...... car, une transaction entachée de dol, quant à la " partie qui le concerne (l'avoué), est pour lui comme non " avenue."

Bioche, Vo. dépens, n° 241 & 242, enseigne la même doctrine. D'après ces autorités nous sommes d'opinion que la requête du procureur ne peut être admise.

Si le requérant eût fait voir que la transaction lui avait causé quelque préjudice, nous aurions eu à examiner, si dans ce cas il pourrait intervenir sur l'appel pour en continuer les procédés malgré les parties, ou s'il ne devrait pas, au contraire

procéder par voie directe contre les parties pour les faire condamner à lui payer ses honoraires. McCord & McCord.

Dans l'arrêt cité par Dalloz, le tribunal a jugé que l'intervention sur l'appel ne pouvait être admise, mais que l'avoué avait son recours contre les parties, nonobstant la transaction. Nous n'avons pas à juger cette question.

Il nous suffit de dire que le requérant n'a pas allégué qu'il avait un intérêt suffisant pour qu'il lui fût permis d'intervenir, et sa requête est rejetée.

P. J. COYLE, Procureur du Requérant.

MONTRÉAL, 27 SEPTEMBRE 1882.

Coram DORION, J. C., MONK, TESSIER, CROSS, Juges.

No. 256

ADOLPHE SAINTE-MARIE,

Défendeur en Cour inférieure,

APPELANT ;

ET

FREDERICK W. STONE.

Demandeur en Cour inférieure,

INTIMÉ.

JUGÉ : Que la prescription, en fait de lettres de change et de billets promissoires, ne commence à courir que de l'expiration du dernier jour de grâce pour les lettres de change et les billets payables à terme fixe.

DORION, J. C.—L'appelant, poursuivi sur deux billets promissoires, en date du 14 décembre, 1874, et payables le 28 mai, 1875, a opposé la prescription de cinq ans.

L'action n'a été signifiée que le 29 mai 1880, et l'appelant prétend que la prescription doit courir du jour de l'échéance mentionnée aux billets. L'intimé, au contraire, prétend que la prescription ne doit courir que de l'expiration du troisième jour de grâce et qu'elle ne doit compter que du 31 mai, 1875. La Cour inférieure a maintenu les prétentions de l'intimé et a condamné l'appelant à payer la somme de $1,596.83, montant de deux billets sur lequels l'action a été portée.

L'appel est de ce jugement, et l'appelant invoque l'art. 2306 du Code Civil, qui veut que toute lettre de change soit présentée par le porteur, ou de sa part pour payement, dans l'après-midi du troisième jour *après son échéance*, et l'art. 2260 § 4, se lit comme suit : " L'action se prescrit par cinq ans en fait

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" de lettres de change à l'intérieur où à l'étranger, billets pro-" missoires, ou billets pour la livraison de grains ou autres " choses, négociables ou non, (et en toutes matières commer-" ciales), *à compter de l'échéance* ; cette prescription, néanmoins, " n'a pas lieu quant aux billets de banque." Or, dit l'appelant, par le premier de ces articles, l'échéance est le jour où d'après la convention des parties le billet est payable, et par le second la prescription commence à compter de cette échéance, c-à-d. du jour où il a été convenu qu'il serait payable.

La version anglaise de l'article 2260 se sert des mots " reckoning from maturity " au lieu de ceux " à compter de l'échéance. " Ces deux articles ne sont pas donnés comme étant de droit nouveau et c'est la première fois que la question ait été soulevée. D'après l'appelant, la prescription commencerait à courir avant que l'action ne soit acquise aux créanciers, ce qui est contraire à toutes les règles. En effet, la prescription est un mode d'éteindre les actions, et elle ne peut courir que du jour que le créancier peut se pourvoir. (Proudhon, de l'usufruit t. 4, nos 2131 et 2152.) Si la prescription devait se compter avant l'expiration des trois jours de grâce, il s'en suivrait que le porteur n'aurait pas cinq années pour intenter son action, mais seulement cinq années moins trois jours, et c'est là, en effet, la prétention de l'appelant. Il n'a pu la soutenir d'aucun précédent ni d'aucune autorité, et l'on trouve partout que la prescription se compte de l'expiration du dernier jour de grâce.

Ainsi l'ordonnance de 1673, t. V. art. 21, disait : " Les lettres " et billets de change sont réputés acquittés après cinq ans de " cessation de demandes et poursuites à compter du lendemain " de l'échéance ou du protêt, ou de la dernière poursuite," et l'article 189 du Code de commerce dit également que les actions relatives aux lettres de change et aux billets se prescrivent par cinq ans à compter du jour du protêt. Ce jour est considéré être le jour de l'échéance.

Smith, Mercantile Law, p. 241, s'exprime ainsi : " A bill or " note payable on a particular day is not really payable till " three days afterwards etc. "

Bell, Commentaries, T. 1. p. 393, après avoir dit que le billet se prescrit par six ans à compter de son échéance, ajoute : 1° " The term of six years runs from the last day of grace in " bills payable at a fixed term. "

Il est évident que les commissaires qui ont préparé le Code se sont servi, dans l'article 2306, du mot "échéance", qui n'est pas un terme technique, pour indiquer l'époque fixée par la convention des parties, et que dans l'article 2260, ils ont employé le même terme dans le sens d'exigibilité, ainsi que le mot *maturity*, dans le texte anglais, le fait voir.

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La prescription du billet promissoire ne commence donc à courir que du jour où le porteur peut en exiger le paiement, c-a-d. à compter de l'expiration du troisième jour de grâce.

Pothier, Traité des obligations, nº 680, dit : "Il résulte de ce qui vient d'être dit, que le temps de la prescription ne peut commencer à courir que du jour que le créancier a pu intenter sa demande......... De là il suit que le temps de la prescription ne peut courir, tant que l'action n'est pas encore ouverte et que la créance est encore suspendue par une condition dont on attend l'existence.

Nous sommes donc d'opinion que le jugement de la Cour inférieure doit être confirmé.

Jugement confirmé.

ROBIDOUX & FORTIN, *pour l'appelant.*
CARTER & CARTER, *pour l'intimé.*

MONTRÉAL, 20 SEPTEMBRE, 1882.

Coram DORION, J. C., MONK, RAMSAY, TESSIER, CROSS, J. J.

No. 73.

JOHN TEMPEST, *esqualité* & consorts et al.

Demandeurs en Cour inféreure,

APPELANTS;

ET

G. M. BABY & consorts.

Opposants en Cour inférieure.

INTIMÉS.

L'appelant a fait saisir des immeubles sur Arthur McConville, curateur à la succession de feu Joseph Baby. Les intimés ont produit une opposition à cette saisie dans laquelle ils réclament partie des immeubles.

JUGÉ: Que l'opposition des intimés doit être maintenue et la saisie déclarée nulle, parce qu'elle a été faite *super non possidente.* (art. 546, 553, et 632 C. P. C.)

DORION, J. C.—Tempest, en sa qualité d'exécuteur testamentaire de feu Daniel Gorie, a fait saisir sur Arthur McConville, curateur à la succession de feu Joseph Baby,

John Tempest & G. M. Baby et al.

certains immeubles situés dans les districts d'Iberville et Montmagny. Les intimés, par opposition, réclament partie de ces immeubles. Ils prétendent qu'ils en sont en possession *animo domini* et que la saisie ne pouvait se faire sur McConville, qui n'en a jamais été en possession ; que le jugement rendu contre feu Joseph Baby n'a jamais été déclaré exécutoire contre le curateur à sa succession vacante, et qu'ils sont propriétaires des immeubles saisis en vertu de titres qu'ils allèguent dans leur opposition.

La Cour inférieure a maintenu l'opposition des intimés, 1° parce qu'un jugement ne peut être exécuté que contre la partie contre laquelle il a été rendu et qu'il ne peut l'être contre ses représentants, à moins qu'il n'intervienne un autre jugement qui déclare le premier exécutoire contre eux, et, 2° parce que la saisie a été faite *super non domino.*

Quant au premier moyen, le curateur à la succession vacante ne se plaint pas de ce que le jugement n'a pas été dé claré exécutoire contre lui en sa qualité de curateur. De plus les héritiers de feu Joseph Baby se sont fait relever de la renonciation à la succession de leur père et se sont, par requête en intervention, joints aux demandeurs pour contester l'ap pointement des intimés. Les intimés, qui sont des tiers, in voquent, comme moyen de nullité, les dispositions de l'article 546, C. P. C., lorsque les parties immédiatement interressées ne se plaignent pas. Sous ces circonstances, nous ne sommes pas prêts à déclarer que nous eussions prononcé la nullité de la saisie, si ce moyen seul eût été invoqué.

Le second motif du jugement est, que la saisie n'a pas été faite sur le propriétaire. Pour juger cette question il faudrait examiner la validité des titres invoqués par les parties, et nous ne croyons pas que ce soit nécessaire ici, ni que la Cour Supérieure ait voulu décider cette question.

Mais l'article 553 dit : " Le créancier peut faire saisir-exé-" cuter les biens soit meubles, soit immeubles, du débiteur, " *qui sont en sa possession,* ainsi que les meubles corporels qui " sont en la possession du créancier ou en celle des tiers, si " ceux-ci n'y objectent pas ; autrement le créancier ne peut " dans ce dernier cas procéder que par voie de saisie-arrêt. "

Cet article fait donc une distinction entre la saisie des meubles et celle des immeubles. En effet, pour saisir les immeubles, il faut qu'ils soient en la possession du débiteur,

tandis que les meubles peuvent être saisis soit entre les mains du débiteur ou des tiers, si ceux-ci n'y objectent pas.

L'article 632, § 1, dit la même chose en termes un peu différents. " On ne peut saisir les immeubles que sur la personne condamnée qui les possède *animo domini.*" Cet article fait donc une défense expresse de saisir les immeubles sur ceux qui ne les possèdent pas *animo domini.*

Ici il est prouvé que les intimés sont en possession, depuis un grand nombre d'années, des immeubles réclamés par leur opposition, et cette prescription de ne pouvoir saisir les immeubles que sur ceux qui les possèdent *animo domini* n'est pas seulement dans l'intérêt des parties, directement intéressées, mais de tout le public. Du reste les opposants ont invoqué cette nullité de la saisie et nous croyons qu'ils avaient droit de le faire. La contestation entre les appelants et les intimés soulève réellement une question du droit de propriété, dont la décision dépend de la validité des titres que chaque partie invoque. Au moyen de la saisie qui a été faite, cinq opposants, tous en possession de partie des immeubles saisis, ont été obligés de venir faire valoir leurs droits et défendre leurs titres de propriété dans le district de Montréal, c'est à dire, en dehors de la juridiction de leur domicile, comme ils auraient pu le faire, si les appelants avaient porté contre eux l'action pétitoire. L'on sent par là quel inconvénient il y aurait de permettre de saisir des immeubles sur des personnes qui n'en sont pas en possession *animo domini*, outre le danger des collusions qui pourraient intervenir entre de prétendus créanciers, d'une part et de prétendus débiteurs, de l'autre.

Nous croyons donc le jugement de la Cour supérieure bien fondé, non pas parce que la saisie a été faite *super non domino*, mais parce qu'elle a été faite *super non possidente* et en contravention aux articles 553 & 632 du Code de Procédure Civile. Quant à la question des titres de propriété, nous ne croyons pas devoir la décider dans cette cause-ci. (1)

Jugement confirmé.

L'HON. T. J. J. LORANGER, C. R., *pour les appelants.*
S. PAGNUELO, C. R., *pour les intimés.*

(1) Quatre autres causes portées devant cette Cour entre Tempest et Tousignant, Tempest et M. G. Baby, Tempest et J. O. Tousignant, La Révérende Sœur Caroline, née Cordélia Baby, et Laviolette, ont été décidées par le même jugement, la question soulevée étant la même dans ces différentes causes.

MONTRÉAL, 24 NOVEMBRE, 1880 & 19 JANVIER, 1882.

Coram DORION, J. C., MONK, RAMSAY, TESSIER, CROSS, Juges.

Nos. 64 et 381.

JEAN BAPTISTE SAINT-LOUIS, FILS,

Demandeur & Défendeur Incident en 1ere Instance.

APPELANT

ET

H. J. SHAW,

Défendeur & Demandeur Incident en 1ere Instance.

INTIMÉ.

Action par l'appelant réclamant une somme de $2,105.75 étant pour balance du prix de trois murs construits pour l'intimé.

Le défendeur intimé a plaidé que l'un de ces murs avait été mal fait, qu'il avait été obligé de le faire démolir, ainsi qu'un mur en briques qu'il avait fait ériger sur le mur construit par l'appelant, et se portant demandeur incident, il a reclamé de l'appelant des dommages au montant de $6,368.

JUGÉ.—1o. Que, nonobstant le protêt de l'appelant par lequel il a déclaré à l'intimé avant de commencer les travaux qu'il n'entendait pas répondre des dommages que les gelées pouvaient causer aux murs qu'il avait entrepris de construire pour lui, il est néanmoins responsable des détériorations que l'un de ces murs a éprouvées par la gelée, parce qu'un constructeur ne peut, par une simple protestation de ce genre, se décharger de la responsabilité que lui impose la loi.

2o. Que cette responsabilité ne s'étend dans ce cas qu'au rétablissement du mur qu'il a construit et non au rétablissement du mur en briques que l'intimé a construit au dessus, après avoir été notifié du risque qu'il y avait que ce mur ne fût détérioré par les gelées.

DORION, J. C.—Le 7 novembre, 1872, l'appelant s'est obligé, par écrit, de construire pour l'intimé trois murs en pierre consistant dans la façade en pierres de taille, l'arrière pan et un mur de coté, d'un bâtiment situé sur la rue Craig ; le mur de coté dont il est principalement question en cette cause devant, d'après les plans et devis, s'étendre de la rue Craig à la rue des Fortifications, et s'élever depuis les fondations qui étaient déjà faites jusqu'au sous-sol.

Ces murs devaient être faits pour $4,877 et devaient être livrés le 15 janvier, 1873.

L'appelant ayant fait les ouvrages qui ont été reçus par l'intimé réclame, par cette action, une somme de $2,045.75 sur le prix de son contrat, plus $60 pour ouvrages additionnels.

L'intimé a répondu à cette demande, que le mur de côté avait été mal fait et que, dès le printemps de 1873, il avait été obligé de le faire démolir, ainsi que le mur en briques qu'il avait fait ériger sur ce mur en pierres pour former le pignon

de son bâtiment ; que ces travaux lui avaient couté $3,000, et il a demandé le renvoi de l'action de l'appelant. Il s'est de plus porté demandeur incident et a reclamé des dommages au montant de $6,368.

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Cette contestation a été référée à trois experts, dont deux ont fait un rapport favorable à l'appelant et le troisième en faveur de l'intimé. Tous trois s'accordent à dire que l'ouvrage a été bien fait et avec de bons matériaux, mais deux d'entr'eux ont été d'opinion, que si le mur a été détérioré et n'a pu supporter le mur en briques qui a été élevé au-dessus, c'est parceque l'intimé a fait démolir un mur de refente et des contreforts qui soutenaient les fondations, pendant que le troisième est d'opinion que le mur a été détérioré par les gelées et qu'il n'aurait pas dû être construit en hiver, parce qu'il est impossible, à raison de la rigueur du climat, de faire de bon ouvrage à cette saison de l'année.

La Cour de première instance a adopté le rapport de la majorité des experts et a condamné l'intimé à payer à l'appelant le montant entier de sa demande $2,105.75.

Ce jugement a été infirmé par la Cour de révision, qui a condamné l'appelant à payer à l'intimé les $6,368 de dommages qu'il réclamait par sa demande incidente. (M. le juge Rain ville différant.)

L'appelant se plaint de ce jugement et demande le rétablis sement de la condamnation prononcée par la Cour de première instance.

Après avoir examiné la preuve avec tout le soin qu'il m'a été possible de donner à cette cause, je constate qu'elle présente plutôt une difficulté quant à l'application du droit, qu'une question de fait.

Il me paraît établi hors de tout doute que l'ouvrage de l'appelant a été bien fait et avec de bons matériaux et que, s'il avait été fait dans une autre saison, il n'aurait pas pu être mieux fait.

D'un autre côté il me paraît évident que la gelée a considérablement détérioré ce mur, qui, à raison de la saison dans laquelle il a été construit, n'était pas aussi bon qu'il aurait dû l'être pour soutenir un bâtiment des dimensions de celui de l'intimé.

La loi est très sévère à l'égard des ouvriers constructeurs et les rend responsables de tout défaut quelconque, même des

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vices du sol. (Art. 1688 C. C.) Lorsque l'intimé a commencé la construction de ce mur, il avait des doutes quant à la s olidité d'un ouvrage de ce genre fait à cette saison de l'année, puisque, par son protêt du 19 novembre, 1880, il a déclaré à l'intimé qu'il n'entendait pas être responsable des dommages qui pourraient être causés par les gelées ; mais un constructeur ne peut se décharger de la responsabilité que lui impose la loi par une simple protestation. S'il voulait se soustraire à cette responsabilité, il lui fallait, de deux choses l'une, ou refuser de faire l'ouvrage à cette saison de l'année, ou obtenir de l'intimé une décharge formelle de toute responsabilité pour le cas ou ses travaux souffriraient des gelées. Il y a même des auteurs qui prétendent que cette responsabilité étant dans l'intérêt général, les parties ne peuvent y déroger, pas même par des conventions expresses. (Laurent, T. 26, Nos. 33 et 51.)

L'appelant n'a ni refusé de faire l'ouvrage, ni exigé une décharge, et il doit être tenu de la solidité de son ouvrage pendant dix ans.

Mais la responsabilité de l'appelant s'étend-elle également au mur en brique qui a été construit au-dessus du sien par l'intimé, à une hauteur de cinquante à soixante pieds ? Je ne le crois pas.

Celui qui, par l'inexécution de son obligation,cause quelque dommage à celui envers qui il s'est obligé, est en général tenu de l'indemniser des pertes qui sont une suite directe et immédiate de sa faute,même des dommages extrinsèques, c'est-à-dire de ceux qui ne se rapportent pas à la chose même qui a fait l'objet du contrat. Pothier en donne des exemples aux Nos. 162 et 163 de son Traité des obligations, où il parle de poutres pourries, de tonneaux infectés et d'une maison qui s'écroule, mais ces exemples se rapportent tous à des cas où les vices étaient ou devaient être connus du débiteur, et où ils étaient inconnus au créancier. Est-ce bien le cas ici ?

L'appelant, avant de commencer ses travaux, dénonce à l'intimé les dangers qui peuvent résulter des gelées et déclare qu'il n'entend pas s'en rendre responsable. L'intimé ainsi mis sur ses gardes le laisse néanmoins procéder. Nous avons vu qu'il ne perd pas pour cela son recours quant à la valeur du mur même, mais il n'était pas justifiable d'aggraver la position de l'appelant, en construisant sur ce mur, sans auparavant

faire constater si ce mur était ou pouvait être affecté par les gelées.

Si l'appelant devait savoir que les gelées détérioreraient son mur, les ouvriers qui ont construit le mur en briques pour l'intimé devaient également le savoir et, dans ce cas, ils sont responsables envers l'intimé d'avoir érigé ce mur sur une fondation insuffisante. (Wardle & Bethune, 4 L. R. P. C. 33.) Chacun devrait alors perdre le prix de son ouvrage, puisqu'il y a eu faute de part et d'autre.

Mais il y a plus que cela. Le mur en briques a été construit en hiver, comme le mur en pierres sur lequel il a été appuyé, et il est prouvé qu'au lieu de le placer sur le milieu du mur en pierres, ainsi que les règles de l'art l'exigeaient pour un mur d'une telle hauteur, il a été placé sur le bord du mur en pierres à un pouce ou deux seulement du parois extérieur, en sorte qu'il ne portait pas également sur tout le mur, mais exclusivement sur la moitié du mur du côté où plus tard l'on s'est aperçu qu'il déversait. Ce vice de construction a été indiqué par Augustin Laberge, l'un des ouvriers qui a le plus d'expérience dans ce genre de construction, pendant même que l'on élevait le mur.

Il est encore prouvé qu'afin de faire une vaste salle dans le bas de son bâtiment, l'intimé a défait un mur de refente et des contreforts qui reliaient et appuyaient les fondations, et que ces altérations, faites depuis la construction du mur en pierres fait par l'appelant, ont diminué la solidité de l'édifice et ont été, d'après un nombre de témoins, la cause, ou du moins ont contribué aux dommages qui sont résultés au pignon du bâtiment de l'intimé.

Il est ici à propos de faire remarquer que quoique l'appelant ait construit toute la façade du bâtiment de l'intimé sur la rue Craig et celle sur la rue des Fortifications de bas en haut, il n'y a que le petit mur du coté surmonté par le mur en briques que l'intimé a fait faire qui ait souffert, ce qui démontre que l'ouvrage de l'appelant était bien fait.

Prenant en considération toutes les circonstances de cette cause, j'en suis venu à la conclusion, non sans quelqu'hésitation, que la partie du mur du pignon du bâtiment de l'intimé qui a été construite par l'appelant a été détériorée par les gelées et que l'appelant étant responsable de ce vice, même après réception de l'ouvrage, ne peut en répéter le prix, si ce

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n'est après déduction de ce qu'il en a couté à l'intimé pour le rétablir ; que le mur en briques n'a pas été construit comme il aurait dû l'être pour couvrir et protéger le mur en pierres fait par l'appelant et que l'intimé informé du danger que les gelées pourraient causer n'aurait pas dû le faire construire avant de s'assurer si les fondations étaient suffisantes ou non, et qu'enfin l'appelant a contribué à la détérioration du mur du pignon de son bâtiment en démolissant le mur de refente et les contreforts qui appuyaient les fondations de son bâtiment.

C'est ici le cas d'appliquer ce principe bien connu dans notre droit, que chacun doit contribuer à réparer le dommage qu'il a causé, en proportion du dégré de sa faute.

" Les juges, (dit Larombière sous l'article 1383, C. N., No. " 28, p. 707) sont souverains appréciateurs des circonstances " qui peuvent les autoriser à modérer les dommages et inté- " rêts. Ils sont de véritables jurés, ayant la faculté d'admettre " ou de rejeter pour ainsi dire les circonstances, atténuantes, " concernant le montant des réparations civiles. La nature du " fait, le degré de la faute, le caractère de la négligence ou " de l'imprudence, la fraude, l'intention ou l'absence de " dessein de nuire, telles sont du coté de celui auquel un " délit ou quasi-délit est imputé, les circonstances principales " qui sont abandonnées à leur appréciation.

" Quant à la partie lésée, *ils ont en même temps à considérer " par rapport à elle les circonstances diverses qui sont de nature " à aggraver ou à atténuer les conséquences dommageables du " fait à son égard, ou qui sans détruire complètement toute res- " ponsabilité de la part de l'auteur du délit ou quasi-délit, " tendent néanmoins à la diminuer en établissant que le fait, " dans son existence même, ou dans ses résultats nuisibles, est, " dans une mesure plus ou moins considérable, également impu- " table à l'imprévoyance, la légèreté, la négligence, l'imprudence, " à la faute, en un mot, de celui qui poursuit la réparation. Les " juges laissent alors à la charge de ce dernier une portion plus " ou moins forte du dommage qu'il a éprouvé, en proportion de " sa responsabilité propre et de l'imputabilité du fait à son égard. " L'indemnité se détermine ainsi proportionellement aux fautes et " aux torts que la partie lésée doit imputer à elle-même et à son " adversaire.* Ce mode de détermination est une très légitime " satisfaction donnée aux principes du droit et de l'équité."

Sourdat, de la Responsabilité, T. 1, No 662, enseigne la même

chose, et la règle n'est pas différente, lorsque les dommages résultent de l'inexécution d'une convention.

Pothier, au No. 164 de son Traité des Obligations, s'appuyant sur l'autorité de Dumoulin, montre avec quelle équité les tribunaux doivent agir en fixant le chiffre des dommages, en disant : " A l'égard des dommages et intérêts dont est tenu un " débiteur faute d'avoir rempli son obligation, dans le cas " auquel on ne peut lui reprocher aucun dol, il nous reste à " observer, que quand les dommages et intérêts sont considé- " rables, il ne doivent pas être taxés et liquidés en rigueur, " mais avec une certaine modération."

Ici la Cour de Révision a renvoyé la demande de l'appelant et l'a condamné sur la demande incidente de l'intimé à lui payer $6,368 de dommages,

L'appelant perd par là $2,105.75 sur le prix de ses ouvrages, plus $6,368, en tout $8,473.75 de dommages, pour avoir commis l'imprudence de construire dans une saison qui n'était pas convenable, car on ne peut rien lui reprocher quant à la qualité de son ouvrage.

La Cour de Révision a compris dans les dommages qu'elle a accordés une somme de $2,000 pour perte de loyer. Or il est évident que si les travaux ne pouvaient pas se faire en hiver l'intimé devait dans tous les cas être privé de son loyer pendant que l'on aurait construit la bâtisse dans l'été de 1873 et que, par conséquent, il ne pouvait rien réclamer à cet égard.

Il est évident que la Cour de Révision s'est écartée des règles indiquées par Pothier, Dumoulin et Larombière, relativement à la liquidation des dommages.

La majorité de la Cour est d'opinion que l'appelant devrait payer pour la reconstruction du mur, sans être tenu aux autres dommages, qui doivent être supportés par l'intimé ou ceux qu'il a employés pour construire le mur en briques, et comme la preuve n'établit pas combien la reconstruction du mur en pierres a couté, il est ordonné que le dossier soit remis à la Cour de première instance pour faire constater par experts la valeur de ce mur, déduction faite de la valeur des matériaux de celui contruit par l'appelant qui ont été employés dans le nouveau mur.

Messieurs les juges Monk et Tessier sont d'opinion que le jugement de la Cour de Révision devrait être infirmé en

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entier et celui de la Cour de première instance confirmé avec dépens.

Jugement réformé.

Conformément à cette décision le dossier à été renvoyé devant la Cour supérieure, qui a rendut son jugement le 27 mars 1877. Ce dernier jngement a été porté en appel par Shaw et confirmé le 19 janvier, 1882. L'honorable Juge en Chef, qui prononça le jugement de la Cour, le fit précéder des remarques suivantes :

Cette cause est déjà venue devant nous sur un appel interjeté par Saint-Louis et dans laquelle Shaw, l'appelant était intimé.

Nous avons alors par un Interlocutoire du 22 novembre, 1880, réformé le jugement qui avait été prononcé par la Cour de revision et ordonné une expertise pour constater la valeur d'un mur dont le coût devait être payé par l'intimé.

L'expertise a eu lieu devant la Cour supérieure. Les experts ont estimé à $590 la valeur de ce mur et la Cour a, par son jugement, déduit cette somme du montant de la demande de l'intimé et lui a donné jugement pour $1,515.75, balance de sa réclamation avec intérêts et dépens.

Ce jugement est conforme à l'Interlocutoire rendu par cette Cour et doit par conséquent être confirmé.

Jugement confirmé.

LORANGER, LORANGER & BEAUDIN, *pour Saint-Louis.*
KERR, CARTER & McGIBBON, *pour Shaw.*

MONTRÉAL, 6 MARS, 1882.

Coram DORION, J. C., MONK, RAMSAY, TESSIER & CROSS, J. J.

No. 94

THE STADACONA FIRE & LIFE INSURANCE COMPANY,

Demanderesse en Cour inférieure,

APPELANTE.

ET

H. C. CABANA,

Défendeur en Cour inférieure,

INTIMÉ.

L'intimé, poursuivi pour cinq versements sur les actions qu'il a souscrites dans le fonds social de la Compagnie appellante, plaide qu'il n'a souscrit ces actions qu'à la sollicitation de l'agent de l'appelante et sur la promesse qu'il ne serait jamais appelé à les payer.

La Cour d'appel, sans se prononcer sur la légalité d'une semblable défense, a jugé, infirmant le jugement de la Cour de première instance : **The Stadacona Insurance Co. & H. C. Cabana.**

1o Que l'intimé n'avait pas prouvé les allégués de son exception ;

2o Que la production du certificat du secrétaire de la compagnie que l'intimé avait souscrit le nombre d'actions mentionnées, sur lesquelles le Bureau de Direction avait appelé cinq versements, constituait une preuve suffisante pour supporter l'action.

Cette action a été portée par l'appelante contre le défendeur intimé pour recouvrer une somme de $250, montant des cinq premiers versements sur dix actions souscrites par l'intimé dans le fonds social de la compagnie appelante.

L'intimé a répondu à cette demande en niant les allégués de la déclaration, puis en alléguant que M. Bossé, agent de la compagnie, avait obtenu d'une manière frauduleuse la signature de l'intimé sur le livre d'actions de la compagnie, en lui représentant qu'il voulait seulement sa signature comme moyen d'influence et qu'il ne serait jamais requis de payer le montant des parts souscrites, et qu'en cette occasion l'intimé n'avait fait que prêter son nom pour aider l'appelante à obtenir d'autres souscripteurs.

Sur cette contestation la Cour inférieure a renvoyé l'action, parce que l'appelante n'avait pas prouvé les allégués de la déclaration.

Dorion, J. C.—L'appelante a prouvé les allégués de sa déclaration en la manière indiquée par sa charte, 37 Vic., ch 94, sec. 5, en produisant le certificat du secrétaire de la compagnie établissant que l'intimé est actionnaire pour dix actions dans le fonds social de la dite Compagnie, et qu'il doit les cinq premiers versements réclamés sur ces actions. Ce certificat est, par la loi, déclaré devoir être reçu par toute cour de justice, comme faisant preuve *primâ facie* de son contenu.

L'intimé n'a pas spécialement nié les faits qui y sont consignés. Au contraire, par son exception il admet avoir souscrit pour le nombre de parts mentionné dans le certificat. Il corrobore, par là, la preuve déjà faite par le certificat, et sous ces circonstances la Compagnie n'est pas obligée à faire d'autre preuve que de produire le certificat de son officier sous le sceau de la Corporation. (1)

Le défendeur a ajouté, il est vrai, qu'il n'avait signé le livre

(1) Ceci a été jugé par la Cour de Révision, à Québec, *in re Stadacona Insurance Co. v. Trudel*, 6 Q. L. R., 31 ; voir aussi Starkie, on Evidence, vol. 1, p. 479 ; Best, on Evidence, p. 435, § 322.

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d'actions de la Compagnie que par complaisance et, en quelque sorte, pour induire le public a prendre des parts sous le prétexte que lui-même avait souscrit pour un fort montant.

Jusqu'à quel point une telle défense pourrait être reçue dans une cour de justice si elle était prouvée, c'est ce dont nous n'avons pas à nous occuper ici ; (1) il suffit de dire que le défendeur n'a fait aucune preuve semblable. Il n'a fait entendre qu'un témoin, qui a rapporté une conversation entre l'intimé et Bossé et d'après laquelle il paraîtrait que Bossé lui aurait fait certaines représentations pour l'engager à prendre des parts dans la Compagnie, mais il n'a nullement prouvé que Bossé fût autorisé à faire une semblable transaction, ni même qu'il fût l'agent de la Compagnie. L'appelante est porteur de l'engagement de l'intimé par lequel il s'oblige purement et sans conditions à payer les dix actions par lui souscrites dans le fonds social de la Compagnie, et il ne peut se libérer de cet engagement, sous le prétexte qu'il aurait fait un traité secret pour tromper le public avec quelqu'un dont il ne prouve nu l lement l'autorité.

Le jugement de la Cour inférieure doit donc être infirmé, parce que la Compagnie a suffisamment prouvé les allégués de sa déclaration et que l'intimé n'a nullement prouvé ceux de la défense.

(Les honorables Juges Monk & Tessier, différant.)

Jugement Infirmé.

BROOKS, CAMIRAND & HURD, *pour l'Appelante.*
H. C. CABANA, *pour l'Intimé.*

MONTREAL, 20TH SEPTEMBER, 1882.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, J.J.

No. 536

ARCHIBALD CASSILS & al,

APPELLANTS;

AND

JOHN FAIR, *es qualité.*

RESPONDENT.

The Appellants took out a writ of appeal immediately after the judgment and before the delay for inscribing in review had expired. The Respondent inscribed in review within the delay of eight days fixed by law, and now moves to dismiss the appeal, 1st

(1) On peut cependant, sur cette question, consulter avec avantage la cause de *Barned's Bankiny Co.* (limited) v. *Reynolds,* 40 Q. B. Upper Canada Reports, 435.

because it has been taken within the delay for inscribing in review; 2ly. because the judgment is not a final one and the Appellant should have obtained leave to appeal. A. Cassils et al & John Fair.

Held: 1st. That the appeal was rightly taken and the Respondent could only demand that proceedings be suspended until the proceedings in review were disposed by discontinuance or by final adjudication.

2ly. That a judgment ordering a party to do a specific act, as the delivering of certain promissory notes within a certain delay, or to pay a fixed amount is a final judgment' from which an appeal lies *de plano* and without leave of the Court being required.

Dorion, C. J.—The Respondent has inscribed this case for revision within the eight days prescribed by arts. 497 and 498 of the Code of Civil procedure, but after the Appellants had taken and served their writ of appeal. He now moves to have the appeal rejected 1st because the appeal was taken within the delay allowed to inscribe in revision. 2ly Because the judgment appealed from is an interlocutory judgment and appeal does not lie except on leave of the Court.

By art. 1118, § 3, C. C. P., no appeal could be taken during the delay to demand a review before three judges, nor during proceedings for such review.

This article has, however, been amended by the 34 Vict. ch. 4, (Quebec act.) by which it is provided that: "Notwithstanding art. 1118 of the said Code, proceedings in error or in appeal may be taken during the delay allowed for demanding a review before three judges, or after proceedings in review have been commenced, if the party who has taken such proceedings discontinues the same."

A party may now appeal from a judgment immediately after the judgement is rendered and before the case has been inscribed in review, and if the appeal is not taken before the case is inscribed in review, then the appeal cannot be instituted until the proceedings in review have been terminated by discontinuance or otherwise. The appeal during the delay for review does not deprive the other party from his right to inscribe the case for review, and if he does so within the delay assigned by art. 497 and 498, then the case falls under the provision of art. 499 which provides, that; "The deposit and inscription for revision have the effect of staying the executor of the judgment and *the appeal.*" The appeal having been taken before the cause was inscribed in review was therefore rightly instituted.

The inscription in review has, however, the effect of suspending the proceedings in appeal. This could not have been done otherwise, even if art. 499 did not contain an express provision

A. Cassils et al & John Fair.

to that effet, for by art. 502 the jugdment in review is declared to be the judgment in the suit; in effect it replaces the original judgment.

Instead, therefore, of making a motion to reject the appeal, the Respondent should have moved to suspend the proceedings in appeal until the adjudication of the case in review, as was done in a case of La Compagnie de Navigation Union and Couillard, decided on the 3rd of February, 1876.

The first ground of Respondent's motion is therefore unfounded.

The second ground of the motion is also unfounded.

The action was instituted by the Respondent to recover from the Appellants certain promissory notes given to the Appellants by Alexander Seath in fraud of his creditors. The Superior Court has ordered the Appellants to return to the Respondent within fifteen days two promissory notes, and in default of doing so to pay to the Respondent the sum of $1,500 with interest and costs.

This judgment is a final adjudication of the case. The Appellants are ordered to return two of the notes they have received and in default of doing so within a fixed delay to pay $1,500. As soon as the delay is expired the judgment becomes executory and from that instant the Respondent is intitled to his process if the notes are forthcoming, to compel the Respondents to pay the amount mentioned in the jugdment, without any fnrther order of the Court. The judgment is therefore a final one. The two reasons assigned by the Respondent in his motion being unfounded, the motion must be rejected.

On the 27th of September, 1882, the Respondent made another motion for an order to suspend the proceedings in appeal and to transmit the record to the Superior Court and this motion was granted by consent.

L. N. BENJAMAIN, *for Appellants.*
LAFLAMME, HUNTINGTON & LAFLAMME, *for Respondent.*

MONTREAL, 19 JANVIER, 1882.

Coram DORION, J. C., RAMSAY, CROSS, BABY, Juges.

No. 359

LOUIS HONORÉ CHRÉTIEN,

Défendeur en Cour inférieure,

APPELANT,

&

DANIEL CROWLEY,

Demandeur en Cour inférieure,

INTIMÉ

L'intimé a vendu cinq maisons à l'appelant agissant par l'entremise d'un agent d'immeubles et a reçu en paiement des actions dans la Silver Plume Mining Company qui étaient alors frauduleusement cotées à la bourse à 72 pour cent de leur valeur nominale. Le même jour l'appellant a loué à l'intimé l'une des maisons qu'il venait d'acheter de ce dernier. L'intimé, ayant refusé de payer le loyer convenu, l'appelant l'a poursuivi en résiliation de bail. Défense que l'acte de vente a été obtenu par la fraude de l'appelant et de son agent et doit être résilié. L'intimé a de plus pris une action directe en résolution de la vente.

JUGÉ : 1o. Que la Cour de 1ère Instance a pu ordonner la réunion de ces deux causes quoique l'une fut soumise à la juridiction sommaire et l'autre à la juridiction ordinaire du tribunal, le résultat des deux causes devant dépendre de la validité ou de la nullité de la vente faite par l'intimé à l'appelant.

2o. Que l'intimé avait le droit d'obtenir la résolution de la vente faite à l'appelant, parcequ'il n'avait accepté les actions dans la compagnie " Silver Plume Mining Company, " en paiement, que sur les représentations que cette compagnie était incorporée, et que ses actions avaient une valeur mercantile telle que cotée à la bourse, pendant qu'elle n'était pas incorporée, et que la cote à la bourse avait été obtenue par des manœuvres frauduleuses, et qu'elles n'avaient aucune valeur appréciable, ce qui était à la connaissance de l'agent de l'appelant.

3o. Que l'appelant, qui occupait le même bureau que son agent et avait des rapports journaliers avec lui, ne pouvait ignorer ces faits et, qu'en supposant qu'il aurait été de bonne foi, il ne peut profiter de la fraude de son agent.

DORION, J. C.—Par cet appel l'appelant Chrétien demande la révision d'un jugement interlocutoire du 24 février, 1881, par lequel la Cour Supérieure a ordonné la réunion de deux causes, l'une de Chrétien contre Crowley, pour loyer et résiliation de bail, et l'autre de Crowley contre Chrétien pour résolution d'un acte de vente, ainsi que du jugement final prononcé, dans ces causes réunies, le 14 mai, 1881.

Les faits qui ont donné lieu au litige entre les parties sont ceux ci. Le 21 juillet, 1880, l'intimé a vendu a l'appelant, représenté par son agent George W. Parent, cinq maisons situées à Montréal, pour le prix de $16,000, dont $7,900, devaient être payées à des créanciers hypothécaires et la balance par le transport de 81 parts prises au pair à raison de $100, par part, dans une compagnie connue sous le nom de " *The Silver*

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Plume Mining Company." Des certificats signés par le président et le secrétaire de la compagnie et revêtus du sceau de la compagnie furent remis à l'intimé ou à son agent pour les quatre-vingt-et-une parts, et le même jour l'appelant loua à l'intimé une des maisons qu'il venait de lui vendre et qu'il occupait alors.

En décembre, 1880, l'appelant a assigné l'intimé en vertu des articles 887 et suivants du Code de procédure, pour le faire condamner à lui payer une somme de $69.28, pour loyer, et ordonner, à défaut de paiement, la résiliation du bail du 21 juillet précédent. Subséquemment, l'appelant réclama une somme additionnelle et porta sa demande à la somme de $103.94.

L'intimé a opposé à cette action, qu'il n'avait donné son consentement à l'acte de vente et du bail du 21 juillet, 1880, que parce qu'il avait été trompé par les menées frauduleuses de l'appelant, de son agent George W. Parent et d'autres parties intéressées, qui avaient représenté que la compagnie "The Silver Plume Mining Co." était incorporée, pendant qu'elle ne l'était pas, et que dans le but de tromper le public ils avaient fait coter ses parts à la bourse comme étant de 72½ o/o de leur valeur nominale, pendant qu'elles n'avaient aucune valeur commerciale quelconque ; et il concluait à la résiliation de la vente et du bail et au renvoi de l'action de l'appelant.

Pendant que cette contestation était devant la Cour, l'intimé a intenté une action en résiliation de la vente. A cette action l'appelant a plaidé par une exception de litispendence et par une dénégation générale. Après audition sur une réponse en droit à l'exception de litispendence, la Cour a ordonné preuve avant faire droit et que les deux causes fussent jugées en même temps et, par son jugement final, elle a résilié la vente et le bail du 21 juillet, 1880.

Les objections de l'appelant sont à la fois à la forme et au mérite. La Cour de première instance n'avait pas le droit de réunir les deux causes comme elle l'a fait et de les décider par un même jugement, parceque ces deux causes n'étaient pas pendantes devant la même cour, ni sujettes au même mode d'instruction, voilà pour la forme. Sur le mérite, l'intimé n'a pas prouvé les allégations de fraude.

La première objection n'est pas fondée.

Les deux causes sont connexes, puisque le résultat des deux

dépend de la validité ou de nullité de la vente que l'intimé a faite à l'appelant. Si la vente est nulle l'intimé ne doit pas de loyer et ne peut être expulsé de sa maison. Il n'est pas vrai de dire qu'elles étaient pendantes devant deux juridictions différentes. L'art. 887 du C. de P. dit que les actions en résiliation ou résolution de bail pour les causes y mentionnées sont portées devant *la Cour Supérieure*, ou *la Cour de Circuit*, suivant la valeur ou le montant du loyer réclamé, et c'est en vertu d'un bref émané de la Cour Supérieure que l'intimé a été assigné à répondre à la demande en résiliation de bail. Les deux actions étaient donc pendantes devant la Cour Supérieure, et le fait que les procédés étaient sommaires dans l'une de ces causes n'affectait pas le droit de la Cour d'en suspendre les procédés jusqu'à la décision de la validité de l'acte de vente ou de réunir cette contestation incidente à la contestation principale soulevée par l'action de l'intimé. Lors même que les deux actions auraient été pendantes dans deux juridictions différentes, il aurait été loisible à l'une des cours de suspendre les procédés dans la cause dont elle aurait été saisie jusqu'à la décision de l'autre. L'exercice d'une pareille discrétion est dans l'esprit de la loi, qui a pour but de diminuer le nombre de contestations, surtout entre les mêmes parties. L'appelant ne souffre aucun préjudice de ce qu'au lieu de suspendre ses procédés sur l'action en résiliation de bail, la Cour a ordonné que cette cause serait jugée, non après, comme elle aurait pu le faire, mais en même temps que la cause en résolution de l'acte de vente (art. 15 C. de P.

En France, lorsque deux causes connexes étaient pendantes devant deux tribunaux différents, l'on demandait le renvoi de l'affaire incidente au tribunal saisi de l'affaire principale.

Guyot, dans son Répertoire, v° connexité, en donne un exemple très applicable à la cause actuelle. " Un particulier, " par exemple, (dit l'auteur de l'article,) est assigné pour le " désistement de la propriété d'un héritage ; peu de temps " après il reçoit une nouvelle assignation pour le paiement " des fermages du même héritage pendant un certain nombre " d'années ; il est certain que ces deux affaires ont trop de " connexité pour essuyer chacune une procédure différente ; " il est naturel qu'elles soient décidées par un seul et même " jugement ; c'est pourquoi, si les deux affaires sont portées " chacune dans un tribunal différent, c'est le cas de demander

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" le renvoi de l'affaire incidente devant le juge de l'affaire " principale ou de se pourvoir devant le juge supérieur pour " les faire évoquer devant lui."

A plus forte raison, si les deux affaires sont devant le même tribunal, doivent elles être réunies pour ne former qu'une seule contestation et être décidées par un seul et même jugement.

Quant à la fraude, elle est prouvée d'une manière surabondante. Voici l'histoire de cette mine et des procédés des parties intéressées pour en disposer.

George W. Parent, l'agent de l'appelant, fut d'abord chargé par un nommé Matheney de vendre cette mine et il ne put en disposer. Plus tard Matheney en a vendu neuf dixèmes à Pierre A. A. Dorion et à J. B. Bickerdyke pour $15,000, retenant lui-même un dixième pour sa part.

Entre eux ils ont formé une compagnie dont la mine susdite constituait la mise qu'ils ont évaluée à $4,000,000, et ont divisé ce capital par actions de $100 chacune. Cent de ces parts, dont la valeur nominale était de $10,000, ont été transférées à Parent pour l'indemniser de son trouble dans la tentative qu'il avait faite de vendre la mine pour Matheney.

La compagnie fut organisée avec président et secrétaire; des règlements furent passés dans lesquels la compagnie est qualifiée de corporation ayant un sceau particulier, dont les officiers font usage pour donner de l'authenticité aux certificats des parts émises par la compagnie.

Les démarches sont faites pour faire coter les parts à la Bourse. Le président de la compagnie y fait vendre par un courtier à cinquante et un pour cent de leur valeur nominales des parts, qu'il fait acheter le lendemain à cinquante-deux. Puis il répète l'opération plusieurs fois jusqu'à ce que la cote ait atteint le chiffre de 72½, sans que l'on puisse indiquer une seule transaction réelle. Dans l'intervalle, des intéressés font publier des rapports d'assemblées de la compagnie et des relations exagérées, pour ne pas dire plus, des valeurs et des opérations de la compagnie.

C'est alors que Parent, comme agent de l'appelant, transporta à l'intimé, en paiement de la balance du prix de son immeuble, 44 parts du capital de cette compagnie.

L'appelant n'a pas établi qu'une seule vente sérieuse ait été faite à la Bourse, et la valeur réelle et réalisable des parts de cette compagnie ne paraît pas avoir jamais excédé de un à deux pour cent.

Le résultat de la transaction entre l'appelant et l'intimé est que celui-ci a vendu sa propriété valant $6,000, à la charge de payer $2,500 d'hypothèques, et croyant recevoir la différence par des parts ayant quelque valeur dans une compagnie qu'on lui a représentée comme ayant tous les caractères d'une société incorporée et dont les parts avaient une valeur commerciale, déterminée par la cote de la bourse, lorsqu'elle n'était pas incorporée et que ses parts n'avaient aucune valeur quelconque.

Mais l'intimé prétend qu'il a fait la transaction de bonne foi ; qu'il ne connaissait rien des fraudes par lesquelles l'on a donné une valeur apparente aux parts de la compagnie.

Il est impossible de lire la preuve sans se convaincre que Parent, qui a d'abord été chargé de vendre la mine et qui n'a pu réussir ; qui a ensuite obtenu pour ses services cent actions de la compagnie dont il a disposé ; qui, pour se défaire des parts de l'Intimé, les a échangées pour des immeubles avec l'intimé et Lighthall, et qui a proposé ensuite au témoin Sylverman d'aller aux Etats-Unis pour placer d'autres parts, en les échangeant pour ce qu'il pourrait en trouver, connaissait parfaitement les conditions de la compagnie et que ses parts n'avaient aucune valeur réelle. Parent et l'appelant occupaient le même bureau et c'est Parent qui a fait la transaction pour l'appelant.

Si l'intimé a été trompé par les manœuvres frauduleuses et les réticences de Parent, la transaction doit être annulée, parce que l'appelant ne peut profiter de la fraude de son agent.

Il est vrai que la fraude ne se présume pas, mais elle se prouve par tous les genres de preuve admissibles en loi, et même par de simples présomptions. Dans le cas actuel, les présomptions déduites des faits prouvés sont tellement concluantes qu'elles établissent clairement que Parent et l'appelant con naissaient ou devaient connaître ce qui avait rapport à cette prétendue compagnie ; qu'ils savaient ou devaient savoir qu'elle n'était pas incorporée, et qu'ils ont participé à une fraude, dont le but était d'obtenir les propriétés de l'intimé, sans lui en donner la valeur qu'il s'attendait d'en recevoir.

Pour ces raisons cette Cour est d'opinion qu'il n'y a pas d'erreur dans le jugement de la Cour de première instance,

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qui a annulé la transaction faite entre les parties, et que ce jugement doit être confirmé.

RAMSAY, J.—The appellant sued the respondent under the provisions of the Lessor and Lessees' Act for rent, and in expulsion from certain premises leased to respondent by appellant by deed of lease dated 21st July, 1880. The respondent met this application by a plea in which he, in effect, set forth that the deed of lease resulted from a deed of sale made on the same date, of the house mentioned in the deed of lease and of other property, and which he was induced to make by the fraud of appellant, that the deed of sale ought to be declared null, and that it being declared null the lease also must fall, and with it appellant's demand for rent and in expulsion. Respondent also brought a direct action to set aside the deed of sale as regards all the property so sold by him to appellant, alleging the same fraud. Both cases were in the Superior Court, and both came at the same time before the same judge, the case under the Lessor and Lessees' Act on the merits, and the suit to set aside the deed of sale, on a demurrer to a plea of litispendence. Seeing that the cases involved the same question, and that they should have the same fate, the learned udge in the Court below ordered them to be united, and that they should proceed together.

There can be no doubt as to the equity of the order, but the authority of the judge to make it is questioned. The appellant says; that the jurisdiction of the Superior Court acting under the provisions of the Lessor and Lessees' Act differs from the ordinary jurisdiction of that Court, that the delays are different, that an action in nullity could not be brought under the special Act and with these delays, and that the two issues cannot be mixed because of their different mode of trial.

I think appellant is wrong in the foundation of his argument. The Superior Court proceeding under the Lessors and Lessees' Act is exercising the same jurisdiction as in every other case. By certain rules of procedure it in certain cases proceeds summarily, and in other cases less expeditiously, but it remains the same Court, just as the jurisdiction is the same whether the proceedings begin by a *capias* or by a writ of summons. The mode of exercising the jurisdiction only is different. This being the case, in what does appellant suffer? If

he had been compelled to proceed in the action in nullity on the short delays of the Lessors and Lessees' Act, he would have had a serious ground of complaint; but all that has happened to him is that he has been hindered from snatching a judgment under that Act, without affording the fuller information which the judge required in order to guide him to a safe conclusion. Again, I think it is unimportant whether the judge united the cases on his own movement or by consent of the parties, and it is equally unimportant whether he united them from information gained on an incident where the appellant must succeed or the reverse. Again, if the action under the Lessors and Lessees' Act ought to have been brought in the Circuit Court, it is no reason why it should not proceed *pari passu* with an action properly instituted in the Superior Court. It is also clear that if the Superior Court had no jurisdiction *ratione materiæ* over the case under the Lessors and Lessees' Act, it was an additional reason for dismissing the action.

On the merits, the alleged fraud consisted in appellant having given by machinations to which he was a party, a false value to certain shares of the Silver Plume Mining Company.

The whole question resolves itself into one of fact, and a very narrow one; namely whether the appellant was a party to, or was cognizant of, the artifices practised. There can be no doubt that if respondent had known the real state of the facts he would not have contracted as he did. Error, as appellant properly remarked, is not specially pleaded; but something more is pleaded. Error is included in a plea of fraud. The witnesses for respondent are nearly all interested in defeating his suit, and the evidence is only extracted from them with extreme difficulty. It seems, however, to be sufficiently established that a piece of property supposed to include a mine was purchased for $15,000 by Messrs. Dorion and Bickerdyke from a Mr. Matheney. The ostensible object of the vendor and the purchasers was to form a joint stock company to work this mine, and they actually passed a Deed before Mr. Hart, notary, on the 17th April, 1880, organising an association in the form of a joint-stock company, which they designated as the "Silver Plume Mining Company." The company never was incorporated, but the parties to the Deed se-

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lected a form for a common seal or stamp, and they issued scrip, stamped with this so called seal. The association took over the property purchased for $15,000 at $1,000,000 which was to represent so much paid up capital stock of the company. How this $1,000,000 of paid up stock was distributed does not clearly appear. M. Dorion, President and Treasurer of the Company, admits he was a large holder; but to what extent he declines to say, for the very plausible reason that he does not desire to make an ostentatious display of his wealth. He also declines to state at what price that wealth was secured. He swears positively that he believes, at the time he gives his evidence the stock is intrinsically worth par, in other words that the mine is worth what the association took it at.

This view of the matter was not, however, that generally received, and Mr. Dorion determined to make a supreme effort to correct the erroneous impression. On two occasions he admits that he directed a broker, M. Kinsella, to sell the stock at 50 cents and to buy it back the next day at a slight advance. These instructions were carried out. Mr. Kinsella being examined, tells us, curiously enough, that he sold Silver Plume Mining stock for him on four or five occasions. He has no personal knowledge of "matched orders," that is, I presume, an order to sell with a simultaneous order to buy back; but he admits he bought as well as sold for Dorion, and that, as he says, " it was an ordinary transaction. He gave me the stock to sell and I sold it. " He is then asked the question: " He (Dorion) just now said that he had given you stock to sell and had bought it in the next day, do you contradict that statement?" To this he answers: " *I do not remember without reference to my books.* " And still he had just said that he had no personal knowledge of " matched orders, " and that the transactions for Mr. Dorion were " ordinary " transactions. He further says, that the stock " was jumping up from 50 to 72½, and no one knew any reason for it, and he advised his clients not to touch it. " He " understood the majority of the brokers would not touch it, and that there was some mystery about it." He cannot mention any *bona fide* transaction on the stock exchange with respect to this stock, except Dorion's, and he did know that there were outside transactions, at what rate he will not say. What idea Mr. Kinsella may have desired to convey by his answers it is perhaps unnecessary to examine;

but taken along with Mr. Dorion's admissions' it is perfectly clear to my mind that they together simulated transactions, in order to have a quotation of the stock at a fictitious value, and this was done progressively to convey the impression that the stock was rising in marketable value. L. H. Chrétien & D. Crowley.

Other witnessos flit through the transactions with regard to this so-called company, and give evidence which throws some light on the issues before the Court. These are Parent, and Hawkes, and Silverman, and Chrétien himself.

Silverman avoided compromising himself by excuses that look almost as if he were ashamed of admitting that he had declined to join in an organization to defraud innocent traders in Boston and New York. Being less compromised than some of the others, his evidence posseses a certain frankness which makes it compare favourably with the testimony of some other witnesses. Fully to understand the effect of his evidence, however, it is necessary to state the relations in which the appellant and Parent stood to each other, and the story Parent tries to induce the Court to believe. In the first place, Parent acts ostensibly as the agent of Chrétien,in his transaction with Crowley. So completely does he efface his principal, that one is almost forced to the conviction that Chrétien is a *préte-nom* in the affair. Mr. Chrétien gives the following account of himself and his position. He says, he has no *état*, that he has commenced to work with Parent, that he lives on his private means and by his work, that Mr. Parent does all his business, and that he keeps Mr. Parent's office when he is out, that he knew nothing of the transaction with Crowley, that he gave his *money* into Parent's hands. He admits also that Parent sometimes signs the receipts for his rents which he himself collects, and that he allowed Parent to hypothecate the property bought from Crowley. There is not a word to show the extent of his means, or of what they consist. He gave his *money* to Parent, but it was not with money Parent acquired Crowley's property.

Again, Parent tells us that the proposition to take Silver Plume stock for part price of Crowley's property was made to him by Hawkes, that he said he had no stock of his own but that Chrétien had some. He pretends that he never had any but the trifling amount of $10,000 worth of this stock, which first he tells us he got as a commission for selling the mine,

which afterwards he explains to mean as a substitute for the commission he was to have if he sold it, and which he did not do. This stock he sold to one Baxter. Being examined again, and being asked about a project of trading off his stock for goods in Boston and New-York, he explains that he wished to try and buy stock " cheap, very cheap, " and when it rose on the publication of an anticipated report by Mr. Sills, Silverman and he were to buy goods in Boston and New-York with the stock.

Now, let us see Silverman's account of the proposed transaction at page 45 of Respondent's evidence :—

Q. Mr. Parent has referred to a conversation he had with you in regard to sending you to New York and Boston with this stock and to buy goods, do you remember the date of that conversation, and will you state to the Court the nature of he proposition, and of the conversation, and state what occurred ?

A. He mentioned that Mr. Bickerdyke and himself had something like a quarter of a million dollars of stock. He said $250,000 worth, and he asked me to go with him and Mr. Bickerdyke to New York and Boston, and trade, or endeavor to trade, the stock off for whatever I could get hold of, for jewelry or anything else ; goods of any kind or description.

Q. You have seen that report of Mr. Sills ?

A. I have.

Q. And this conversation that you have just referred to was in anticipation of this report of Mr. Sills coming out ?

A. Yes, I remember the occasion now very well ; Mr Parent said that if we went on, Mr. Sills would very soon make his report from the mines, and while we were on in New York the papers would run up the stock as high as possible.

Q. This was before the report came out ?

A. It was a few days before the report came out.

Q. What date was that conversation ?

A. I do not remember exactly. It must have been a week or two before the report came out that the proposition was made. The report came out perhaps only a few days after theis conversation.

Q. And the nature of this proposition was to buy stock

when it was low and take advantage of Mr. Sills' report, to exchange it off? L. H. Chrétien & D. Crowley.

A. No, we were not to buy stock at all; we were to get rid of stock for any other kind of goods.

Q. And you refused to have anything to do with it?

A. Not exactly refused it, but the same thing. When Mr. Parent was ready to go, I was not. I sought for an excuse, and was not ready to go when he was; but it came to the same thing.

Q. But you were to pay no money at all?

A. No.

Q. The proposition looked to you buying goods, and you would be furnished with mining stock?

A. Yes.

Q. Well now, was Mr. Parent speaking for himself alone, or for others connected with the company?

A. Mr. Bickerdyke was with him in my office, with Mr. Parent.

It is also denied that Parent had anything to do with the company. Silverman again tells us how little truth there is in this. He is asked:

Q. Had you an interview with Mr. Parent in the beginning of last year, in connection with a list of mining properties now in question in this cause, and did Mr. Parent as an agent offer it to you?

A. I had, but I do not know what quality he was acting in I had an interview with him when the company was first formed; it was just starting. Mr. Parent sent for me when Mr Matheny was here. He then asked if I would form a company for the Silver Plume Mine.

Q. Mention what passed at that interview, and at what price the property was put down?

A. I will qualify my last anwer. I saw Mr. Matheny, I went to see Mr. Parent, and Mr. Matheny was there, and he wanted us to float the Silver Plume Mining Company, and he offered us the mine if we would open it out with a million dollars capital. He was to receive $200,000 of stock, and the balance $800,000 he said Mr. Parent and myself were to have to float the company.

Q. You yourself were to have how much?

A. $200,000 of the stock, and Mr. Parent was to get $200,000

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and the balance of $800,000 was to pay Mr. Matheny and to float the company.

Q. You were to pay no money, were you ?

A. No.

Q. And the property was to be turned over to the company ?

A. Yes.

Q. And it was to represent a capital of how much ?

A. Of one milion dollars.

Q. Did you accept or refuse that proposition ?

A. I refused it on certain grounds. We were to take out $800,000 of stock, and we were to sell certain shares.

Q. And you refused it ?

A. I refused it.

Q. Supposing that proposition had been accepted, in what proportion would the money have been furnished by the promoters and by the general public ?

A. The general public would have furnished all the money, and the promoters of the company would have made the profits to be made out of it.

That is, they would have gained all but $15,000. Mr. Dorion says, however, that Parent had noting to do with the organization of the association. Still Mr. Dorion takes credit to himself for having offered Crowley back his property, and that he refused it. Why this zeal, real or affected, for Parent's credit ?

I fully concur with the learned judge in the Court below, that " a very clear case of fraud has been made out," but appellant argues that, even admitting this to be true, the knowledge of the fraud is not brought home to him, and that even if Parent were cognizant of the fraud, he, Chrétien, is not responsible for the fraudulent reticence of his agent.

It is a startling proposition that a party can, under any circumstances, profit by the fraud of his agent because the principal is not privy to it. Appellant's argument is this, that when the agent only suppresses a fact which he knew, and which the principal did not know, and which the principal was only obliged to disclose in case he knew it, there is no fraud of which the purchaser ean take to advantage ; that the purchaser has no right to profit by the accidental knowledge of the intermediary. It seems to me that this is a fallacy. I cannot see how the legal effect of the knowledge of the agent

who transacts my business can be distinguished from my knowledge, with regard to one fact more than with regard to another. I am presumed to know what he knows, for it is by his eyes and ears I carry on my business, I cannot think there can be any doubt on this point in our law, and in English law it seems to be authoritatively decided. Story, Agency, No. 139, 139*a* and 140. In one case Lord Justice Aramwell said : "I think every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract."

Another point urged is that if there be a fraudulent misrepresentation, and the party complaining did not act upon it but acted independently of it, he cannot take advantage of the fraud. The general proposition is indisputable, but it does not apply here. What is contended is that the whole available sources of information were poisoned.

There is another view of the case. If fraud were not clearly established, substantial error remains. The scrip purported to be that of a corporate body; no such body existed. This would be sufficient under our law to annul a contract for want of consent.

Judgment confirmed.

J. E ROBIDOUX, *for Appellant.*
BARNARD, BEAUCHAMP & CREIGHTON, *for Respondent.*

ERRATA.

Page 12, ligne 38, au lieu de *iuterest*, lisez *intent*.

" 127, le nom de l'nitimé est *Andegrave* et non pas *Audegrave*.

Page 176, ligne 5, au lieu de *Demandeur* lisez *Défendeur*.

" 215, re Grant et Beaudry. C'est par erreur que M. S. Bethune, C. R., est mentionné comme conseil de l'Appelant. M. Bethune, consulté par l'intimé, s'est prononcé dans le sens de l'illégalité de l'Association "The Loyal Orange institution."

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